LIBRARY
SUPREME COURT. U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE PROCTER & GAMBLE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

FILED DECEMBER 3, 1956

JURISDICTION POSTPONED FEBRUARY 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, APPELLANT,

VS.

THE PROCTER & GAMBLE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

INDEX

	Original	Print
Record from the U.S.D.C. for the District of New Jersey	1	1
Complaint	1	1
Answer of defendant, Colgate-Palmolive-Peet Company	31	16
Answer of defendant, Procter & Gamble Company	41	23
Answer of defendant, The Association of American Soap and Glycerine Producers, Inc.	57	32
Answer of defendant, Lever Brothers Company	67	40
Notice of and motion of plaintiff for discovery and production of documents as to Procter	78	48
Exhibit A—List of documents	80	50
Exhibit B—Affidavit of Walker Smith	82	52
Transcript of hearing of March 25, 1953 on "Motion for discovery and production of documents under Rule 34" (Excerpts from)	88	53
Opinion, Modarelli, J. granting motion for discovery and production of documents, May 11, 1953	145	56
Order granting motion for discovery and production of documents	151	60

Record from the U.S.D.C. for the District of New Jersey—Continued	Original	Print
Motion of Procter for return of copies and other writings	153	61
Notice of motion	155	62
Affidavit of Kenneth C. Royall	157	63
Motion of Procter to suppress certain documents	163	65
Notice of motion	167	67
Affidavit of Kenneth C. Royall	169	68
Stipulation for inspection and copying by defendants of certain third person documents and approval thereof	193	70
Exhibit A—List of names of third persons	196	72
Opinion, Modarelli, J. denying motions to suppress and for return of copies, January 14, 1954	198	73
Order denying motion to suppress certain documents	202	76
Order denying motion for return of documents	205	77
Notice of and motion of plaintiff for discovery and production of documents as to Colgate	207	77
Affidavit of Joseph E. McDowell	219	89
Notice of and motion of plaintiff for discovery and production of documents as to Procter	222	91
Affidavit of Joseph E. McDowell	235	102
Notice of and motion of plaintiff for discovery and production of documents as to Lever Bros.	238	105
Affidavit of Joseph E. McDowell	249	115
Notice of and motion for order directing disclosure of Grand Jury transcripts as to Procter	265	117
Affidavit of Kenneth C. Royall and affidavit of service	271	120
Transcript of hearing of October 14, 1954 on motions (Excerpts from)	303	124
Transcript of hearing of April 19, 1955 on submission of consent orders (Excerpts from)	856	126
Transcript of hearing of December 7, 1954 on motions for discovery, etc.	880	127
Notice of and motion for an order directing disclosure of Grand Jury transcripts	1130	127
Affidavit of James T. Welch	1136	131
Memorandum in lieu of brief in support of motion, etc.	1138	131
Notice of and motion by defendant; Colgate for disclosure of Grand Jury transcripts	1144	133
Motion by defendant, Lever Bros. for disclosure of witnesses appearing before Grand Jury and transcript of their testimony	1147	134

Record from the U.S.D.C. for the District of New Jersey—Continued	Original	Print
Transcript of hearing of December 12, 1955 on defendants' motions for disclosure of Grand Jury transcripts	1252	136
Appearances	1252	136
Statement by the court	1253	136
Statement on behalf of defendant, Colgate by Mr. Correa	1262	142
Statement on behalf of defendant, Association by Mr. Busick	1288	158
Statement on behalf of defendant, Lever Bros. by Mr. Fortas	1296	162
Statement on behalf of plaintiff by Mr. McDowell	1320	177
Statement on behalf of plaintiff by Mr. Carlson	1322	178
Statement on behalf of plaintiff by Mr. Margolis	1328	182
Further statement on behalf of plaintiff by Mr. McDowell	1337	187
Colloquy between court and counsel	1358	199
Opinion and appendix, Modarelli, J. on defendants' motion to compel plaintiff to produce grand jury transcripts, April 17, 1956	1375	206
Notice by defendant, Association of hearing on motion for order	1410	240
Proposed order by the Association granting leave to inspect and copy transcripts of testimony heard before the Grand Jury	1412	241
Notice by defendant, Procter of hearing on motion for order	1418	242
Proposed order by Procter granting leave to inspect and copy transcripts of testimony heard before the Grand Jury	1420	243
Notice by defendant, Colgate to settle terms of order, etc.	1425	244
Proposed order by Colgate granting leave to inspect and copy transcripts of testimony heard before the Grand Jury	1427	245
Notice of and motion for reconsideration of ruling on defendants' motions to inspect the grand jury transcripts and for ruling on claim of privilege	1432	246
Claim of privilege	1436	248
Government's memorandum of points and authorities in support of motion for reconsideration, etc.	1439	249
Notice of settlement of order	1444	253
Proposed order for settlement	1446	253
Affidavit of Mathias F. Correa	1451	255

	Original	Print
Record from the U.S.D.C. for the District of New Jersey—Continued		
Opinion, Modarelli, J. on Plaintiff's motion for reconsideration of ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on claim of privilege; and on defendants' motions to settle or copy transcripts of testimony heard before Grand Jury, July 9, 1956	1464	257
Order denying motion and claim of privilege and granting leave to Procter to inspect and copy transcripts of testimony heard before the Grand Jury, July 23, 1956	1471	262
Order denying motion and claim of privilege and granting leave to Colgate to inspect and copy transcripts of testimony heard before the Grand Jury, July 23, 1956	1474	263
Order denying motion and claim of privilege and granting leave to Association to inspect and copy transcripts of testimony heard before the Grand Jury, July 23, 1956	1477	265
Order denying motion and claim of privilege and granting leave to Lever Bros. to inspect and copy transcripts of testimony heard before the Grand Jury, July 23, 1956	1480	266
Transcript of hearing on motion for reconsideration of ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on claim of privilege held June 11, 1956	1483	268
Appearances	1483	268
Colloquy	1485	269
Statement on behalf of plaintiff by Mr. McDowell	1488	270
Statement on behalf of defendant, Colgate by Mr. Correa	1540	299
Colloquy	1552	306
Application for leave to file motion on less than 15 days notice to defendants	1568	315
Order granting leave to file motion etc.	1569	315
Notice of and motion of plaintiff to amend or alternatively, to stay order of July 24, 1956 and proposed amended order	1570	316
Affidavit of Herbert Brownell, Jr.	1576	319
Brief in support of plaintiff's motion to amend or to stay order	1578	320
Amended order for inspection and copy of transcript of Grand Jury testimony on behalf of all defendants	1582	322
Answer by defendant, Procter to motion	1585	323
Affidavit of Robert D. Larsen	1588	324

	Original	Print
Record from the U.S.D.C. for the District of New Jersey—Continued		
Judgment dismissing action as to defendant, Procter	1591	325
Judgment dismissing action as to defendant, The Association	1593	326
Order of dismissal	1595	327
Judgment	1596	327
Transcript of hearing on July 23, 1956 on submission of orders for production of Grand Jury transcripts	1606	328
Appearances	1606	328
Transcript of hearing on August 21, 1956 on plaintiff's motion to amend or stay order of July 24, 1956	1612	331
Appearances	1612	331
Brief in support of motion by defendant Procter for order directing disclosure of Grand Jury transcripts	1622	337
Brief of the United States in opposition to motion by defendant Procter for order directing disclosure of Grand Jury transcripts	1632	342
Exhibit A—Clerk's certificate to Cover page of Stenographer's Minutes of hearing before Judge Medina on December 8, 1948 and also pages 190 to 193 inclusive and page 212 of said minutes in case of U.S.A. v. Henry S. Morgan, et al., Civil 43-757	1641	351
Letter from Stanley N. Barnes to Honorable Alfred E. Modarelli, dated April 5, 1956 with attachment	1704	356
Claim of Privilege dated January 13, 1956 in United States v. Standard Oil, et al.	1706	358
Letter from Joseph E. McDowell to Honorable Alfred E. Modarelli, dated December 23, 1955	1709	360
Letter from Alfred E. Modarelli to various counsel, dated September 6, 1956	1711	360
Letter from Victor R. Hansen to Honorable Alfred E. Modarelli, dated September 7, 1956	1713	362
Letter from Abe Fortas to Honorable Alfred E. Modarelli, dated September 7, 1956	1715	363
Letter from Kenneth C. Royall to Honorable Alfred E. Modarelli, dated September 7, 1956	1716	364
Letter from Mathias F. Correa to Judge Modarelli, dated September 7, 1956	1717	365
Letter from McCarter, English & Studer to Honorable Alfred E. Modarelli, dated September 7, 1956	1718	366
Brief in support of plaintiff's motion for production by defendant Procter of documents pursuant to Rule 34	1722	367

Record from the U.S.D.C. for the District of New Jersey—Continued	Original	Print
Brief in opposition to plaintiff's motion for production by defendant Procter, etc.	1725	369
Exhibit A—Affidavit of Kenneth C. Royall	1744	382
Supplemental brief in support of plaintiff's motion for production by defendant Procter of documents, etc.	1758	392
Affidavit of Walker Smith	1769	402
Brief in support of motion by Procter to suppress certain documents, dated June 4, 1953	1787	404
Brief in support of motion by defendant Procter for return of copies and other writings	1796	407
Plaintiff's brief in opposition to motion by Procter to suppress certain documents, dated June 15, 1953	1804	410
Plaintiff's brief in opposition to Procter's motion for return of copies and other writings, dated June 15, 1953	1809	412
Reply brief in support of motion by Procter for return of copies and other writings, dated June 18, 1953	1821	419
Brief of the United States in support of its motions for production of documents under Rule 34, dated September 23, 1954	1828	422
Affidavit of William L. McGovern	1889	430
Exhibit A—Plaintiff's General List No. 1 in Discovery Negotiations and transmittal letter	1807	436
Reply and supplemental brief of Procter in support of its motion for an order directing disclosure of Grand Jury transcripts	2049	439
Brief of Lever Bros. in support of its motion to inspect and copy testimony of witness before the Grand Jury	2065	448
Memorandum in support of motion by Colgate for disclosure of testimony before the Grand Jury	2090	467
Appendix A—Court's pretrial memorandum No. 1 in case U.S.A. v. Standard Oil of California	2139	502
Brief of the United States in opposition to motions for production of Grand Jury transcripts, dated December 7, 1955	2146	505
Supplemental memorandum on behalf of Procter in in support of motion for access to Grand Jury transcripts	2168	525
Supplemental memorandum of Lever Bros. in support of its motion to inspect and copy testimony before Grand Jury, dated December 30, 1955	2182	531
Reply memorandum in support of motion by Colgate for disclosure of testimony before the Grand Jury	2196	540
Brief of Procter in opposition to plaintiff's motion for reconsideration and for ruling on claim of privilege, dated May 14, 1956	2218	555

Record from the U.S.D.C. for the District of New Jersey—Continued	Original	Print
Brief of the defendant, Association in opposition to plaintiff's motion for rehearing and claim of privilege	2225	557
Memorandum of Lever Bros. in opposition to plaintiff's motion for reconsideration and for ruling on claim of privilege	2233	562
Order postponing jurisdiction	2245	565

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., Defendants.

COMPLAINT—Filed December 11, 1952

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, in order to prevent continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2).

2. Defendant Colgate-Palmolive-Peet Company has its general offices and principal place of business within the District of New Jersey. Defendant Lever Brothers Company operates a manufacturing plant within said District. Defendant The Procter & Gamble Company, through its wholly-owned subsidiary, The Procter & Gamble Distributing Company, has a sales office within said District. All three of said defendants transact business within said District.

[fol. 2] II

The Defendants

3. The following corporations are made defendants herein:

A. The Procter & Gamble Company (sometimes hereinafter referred to as "Procter"), a corporation organized and existing under the laws of the State of Ohio, with principal executive offices at Cincinnati, Ohio. Procter carries on its business directly and through wholly-owned subsidiaries including The Procter and Gamble Manufacturing Company, The Procter & Gamble Distributing Company, Procter & Gamble Productions, Inc., The Hewitt Soap Company, Inc., The Procter & Gamble Trading Company, The Procter & Gamble Transportation Company, and The Procter & Gamble Commercial Company, all of which are Ohio corporations.

B. Colgate-Palmolive-Peet Company, a corporation organized and existing under the laws of the State of Delaware, with principal executive offices in Jersey City, New Jersey. Colgate-Palmolive-Peet Company is a consolidation of three corporations, namely, the Palmolive Company, Peet Brothers Company, and Colgate & Company. On or about December 31, 1926, the Palmolive Company acquired in exchange for stock the business and assets of Peet Brothers Company and changed its name to Palmolive-Peet Company. On or about June 30, 1928, Palmolive-Peet Company acquired in exchange for stock the business and assets of Colgate & Company and changed its name to Colgate-Palmolive-Peet Company. Whenever in this complaint reference is made to the acts of "Colgate" prior to December 31, 1926, the reference is to the acts of Colgate & Company, the Palmolive Company and Peet Brothers Company. Whenever reference is made to the acts of "Colgate" between the period December 31, 1926 to June 30, 1928, the reference is to Colgate & Company and Palmolive-Peet Company. Whenever reference is made to "Colgate" after June 30, 1928, the reference is to Colgate-Palmolive-Peet Company.

[fol. 3] C. Lever Brothers Company (sometimes hereinafter referred to as "Lever"), a corporation organized

and existing under the laws of the State of Maine, with principal executive offices in New York, New York.

D. The Association of American Soap and Glycerine Producers, Inc. (hereinafter sometimes referred to as the "Association"), a corporation organized and existing under the laws of the State of Delaware, with principal executive offices in New York, New York. The Association is engaged in the business of collecting, circulating and assisting in the exchange of information among its members relating to the manufacture, sale, use, and promotion of soap, synthetic detergents, glycerine, materials used therein, and kindred products; coordinating the activities of those engaged in the manufacture, sale, use and promotion of such products; and representing them in their relations with others.

4. Each of the defendants Procter, Colgate, and Lever manufactures and sells soap, synthetic detergents, glycerine and other products.

III

Nature of Trade and Commerce

The Commodities

5. Soap is a substance with cleansing properties, produced by treating fats or oils, or derivatives thereof, with an alkaline agent. Most of the soap produced and sold in the United States is designed to be used with water and is water-soluble. Most of the water-soluble soap produced in the United States is designed ultimately to be sold and used as a cleansing product.

6. As used in this complaint, the word "soap" refers to water-soluble soap either in substantially pure form or in combination with builders, fillers, perfumes, or other [fol. 4] additives, and includes bar soap; soap chips and flakes; granulated, powdered and sprayed soap; washing powder; and textile soap (as those categories are used in the Census of Manufactures).

7. Of the soap produced in the United States since 1925 approximately 90% in value was household-soap. The remaining portion was manufactured and sold for industrial use and commonly known as industrial soap.

8. As used in this complaint, the term "household-soap" refers to packaged soap for use in washing laundry, dishes and like articles in the home; toilet bar soap, for use in washing face, hands or body; and laundry and general use bar soap, for use principally for the same purposes as packaged soap and sometimes for the same purposes as toilet bar soap. Household-soap is distinguished from industrial soap principally in that the latter is sold in larger containers and in a different market.

9. Until the development of the washing machine, laundry bar soap was very important among those household-soap categories. But with the increasing use of home washing machines beginning in the late 1920's, the laundry bar began to be replaced substantially by packaged soap in the form of chips, flakes, granules and beads. In the 1920's chips and flakes were the most important soap types. In the early 1930's a product in the form of puffed, hollow beads, produced by spray-dry processes, invented in the middle 1920's, became increasingly important. Since 1936 the spray-dried product has been the largest selling type of household-soap. As against granules, powders, chips and flakes, the spray-dried bead is commercially superior because it flows more freely, is relatively free of fines which cause sneezing, allows impressively larger packages for the same weight and can be produced at lower cost.

[fol. 5] 10. Inedible tallow and grease are principal raw materials used in the production of soap, and are rendered primarily from fat scrap cut from meat by butchers and meat processors. These materials are processed by approximately 700 renderers and by meat packers. Since 1926, annual imports of inedible tallow and grease have been less than 2% of domestic production in all but the years 1934 through 1936, 1942 and 1944. No substantial quantities have ever been traded on an exchange. No exchange exists today and, when inedible tallow and grease were traded on the New York Produce Exchange from 1936 to 1941, the annual tonnage traded never exceeded 3% of the national total.

11. Coconut oil is next in importance to inedible tallow and grease as a fat material for soap.

12. Since World War II inedible tallow and grease have

constituted more than 60% of the total fats and oils used in soap; coconut oil, less than 25%.

13. Synthetic detergents are non-soap cleansing agents synthesized principally from petroleum derivatives, from derivatives of vegetable oils, or from derivatives of animal fats or oils.

14. As used in this complaint, the words "synthetic detergents" refer to water-soluble synthetic detergents designed for sale and use as cleansing agents performing the principal functions of soap (as defined in paragraph 6 of this complaint), either in substantially pure form or in combination with builders, fillers, perfumes or other additives.

15. Of the synthetic detergents produced in the United States since 1946, more than 90% in value were household-synthetic-detergents. The remaining portion was manufactured and sold for industrial use and commonly known as industrial synthetic detergents.

[fol. 6] 16. As used in this complaint, the term "household-synthetic-detergents" refers to packaged synthetic detergents in bead, granule, flake, liquid or bar form, used for the same purposes as household-soap. Relatively small amounts are produced in bar form. As in the case of household-soap, household-synthetic-detergents are distinguished from industrial-synthetic-detergents principally in that the latter are sold in larger containers and in a different market.

17. Synthetic detergents from fatty alcohol derivatives of coconut oil were developed in Germany in the 1920's. Household-synthetic-detergents of this type first appeared on the market in the United States in the early 1930's. Household-synthetic-detergents made from other coconut oil derivatives were marketed in the United States beginning in the late 1930's, but had attained only a small volume of sales prior to World War II.

18. Synthetic detergents from petroleum base materials were perfected at the end of World War II. The petroleum base materials are derived from petroleum fractions. Their development arose largely from increased petroleum research during the war, accelerated by the shortage of natural fats during and immediately after the war. Production of petroleum base materials requires a supply of petroleum fractions and advanced know-how as well as com-

plex production facilities. The petroleum base materials promised from the start to be and have ultimately proved to be, cheaper bases for cleansing agents than either inedible tallow and grease or coconut oil during periods of market reaction to heavy export demand for the natural fats.

19. Synthetic detergent uses are generally co-extensive with those of soap. They have certain performance advantages over soap in hard water. Household-synthetic-deter- [fol. 7] gents produced in puffed and hollow beads by the spray-dry process, like the soap so produced, have commercial superiority over household-synthetic-detergents produced in flakes or ordinary granules.

20. Of combined total dollar sales of household-soap and household-synthetic-detergents in 1951, soap constituted about 60% and synthetic detergents 40%.

21. Glycerine is a by-product of the manufacture of soap and most glycerine is produced as an incident of soap production. Since 1926, total annual dollar sales of glycerine have constituted about 7.5% of total soap sales in the United States.

Sale of Soap and Synthetic Detergents

22. Household-soap has reached the consumer principally through grocery stores, at least since the 1920's. Household-synthetic-detergents have followed the same distribution channels. Today, at least two-thirds of all household-soap and household-synthetic-detergents are bought by consumers from the shelves of self-service grocery stores. Since the 1920's an increasing amount of manufacturers' sales of these products has been made direct to grocers, rather than through jobbers or wholesalers. Industrial soap and industrial synthetic detergents have been and are sold to commercial laundries, textile manufacturers, industrial plants, office buildings, and institutions, or to jobbers and wholesalers which supply them.

23. In self-service grocery stores, the consumer himself removes the particular brands of commodities desired from the shelf. Before the advent of self-service grocery stores, the clerk delivered the brands to the consumer in the store. While display on the shelves of the store, visible to the customer, was then a material factor in contributing to sales,

[fol. 8] it was not essential. In self-service grocery stores, however, the shelf space available for brands of soap, as for brands of any other commodity sold therein, is limited. Unless the operators of such stores are able and willing to place a particular brand of soap on the shelf, it cannot be sold therein. The more prominently a brand is displayed on the shelves, the greater is the likelihood that it will be sold.

24. Various forms of advertising and promotional devices have been developed and used throughout the years to induce the purchase of household-soap and household-synthetic-detergents. Many of these devices entitle the consumer to a credit in cash or in kind when purchasing specified items or combinations of them. They can be used to enable the producer to offer special inducements to selected customers or to customers in selected, limited market areas and need not be employed simultaneously on a nation-wide basis.

Defendants' Position in the Household-Soap and Household-Synthetic-Detergent Industry

25. In 1951 total sales of household-soap by all producers in the United States were approximately $430,000,000. Defendants Procter, Colgate and Lever together have produced and sold at least three-fourths of the national sales of household-soap for each of the past twenty years. The following table shows for selected years the approximate percentages of dollar sales of household-soap in the United States by (1) Procter, (2) Colgate, (3) Lever and (4) Procter, Colgate and Lever combined.

Year	(1) Procter	(2) Colgate	(3) Lever	(4) Total
1925	30%	27%*	9%	66%
1937	40%	18%	22%	80%
1947	37%	19%	19%	75%
1951	40%	14%	21%	75%

* Combined total: see subparagraph 3B.

26. In 1951 total sales of household-synthetic-detergents by all producers in the United States were approximately $280,000,000. The following table shows for each of the [fol. 9] past three years the approximate percentages of dollar sales of household-synthetic-detergents in the United

States by (1) Procter, (2) Colgate, (3) Lever and (4) Procter, Colgate and Lever combined.

Year	(1) Procter	(2) Colgate	(3) Lever	(4) Total
1949	66%	20%	6%	92%
1950	67%	15%	11%	93%
1951	69%	14%	10%	93%

27. In 1951 there were, in addition to the defendants Procter, Colgate and Lever, not more than seven producers of household-soap which sold as much as one per cent of all household-soap sold in the United States and none of these seven sold as much as four per cent of the total. Each of these producers has been in the household-soap business since sometime prior to 1926. No producer who has entered the household-soap business since 1926 has been able to sell even one per cent of the total household-soap sold in any year. Of the producers of household-soap who were in business in 1926 who are not in business today, the soap businesses of eight were acquired by Procter, one by Colgate (in addition to the mergers referred to in paragraph 3B of this complaint), and one by Lever.

28. In 1926 there were no producers of household-synthetic-detergents. Today, in addition to Procter, Colgate and Lever, there are not more than two producers of household-synthetic-detergents who in 1951 sold as much as one per cent of the national total, and neither of these two sold as much as three per cent.

29. The following table shows for 1951 the approximate amounts expended by Procter, Colgate and Lever for advertising and promotion of household-soap and household-synthetic-detergents.

Procter	$74,000,000
Colgate	26,000,000
Lever	27,000,000

[fol. 10] 30. During the period 1936 through 1951, Procter, Colgate and Lever have used in making their soap products more than three-fourths of the total inedible tallow and grease used for making soap in the United States. During the same period they have purchased about two thirds of all the inedible tallow and grease available for use in the United States.

INTERSTATE COMMERCE

31. Each of the defendants Procter, Colgate and Lever now has, and for many years has had, manufacturing plants engaged in producing, and sales offices engaged in selling, substantial quantities of household-soap and household-synthetic-detergents in states other than the states in which they deliver said commodities (or cause to be delivered) to the purchasers thereof.

IV

OFFENSES CHARGED

32. Beginning in 1926 and continuing thereafter up to and including the date of the filing of this complaint, all the defendants have been engaged in a combination and conspiracy in unreasonable restraint of and to monopolize the aforesaid trade and commerce among the several states in the production and sale of household-soap and household-synthetic-detergents in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2). Defendants Procter, Colgate and Lever are now monopolizing and, for at least 15 years prior to the filing of this complaint, have continuously monopolized the aforesaid trade and commerce among the several states in the production and sale of household-soap and household-synthetic-detergents in violation of Section 2 of the Sherman Act (15 U.S.C. Sec. 2). Defendants threaten to continue said offenses and will continue them unless the relief hereinafter prayed for in this complaint is granted.

[fol. 11] 33. The aforesaid combination and conspiracy has consisted of a continuing concert of action among the defendants, the principal objectives of which have been:

A. As to household-soap and household-synthetic-detergents, that defendants Procter, Lever and Colgate

(1) Attain, maintain, augment, and exploit positions of dominance over all others engaged in producing and selling these products; and

(2) Restrict and control competition with each other and with all others engaged in producing and selling these products.

B. As to the principal materials used in soap and synthetic detergents, that defendants Procter, Lever and Colgate

(1) Attain, maintain, augment, and exploit positions of dominance over all others engaged in the purchase and sale of those materials; and
(2) Restrict and control competition with each other and with all others engaged in the purchase and sale of those materials.

34. To effectuate the objectives of the aforesaid combination and conspiracy:

A. Defendants Procter, Lever and Colgate have attained, maintained, augmented, and exploited their dominance over all others and restricted and controlled competition with each other and with all others engaged in the production and sale of household-soap and household-synthetic-detergents

(1) By establishing, maintaining, and dominating the the defendant Association and causing it to assist them in the accomplishment of the objectives of the combination and conspiracy;
[fol. 12] (2) by achieving control (through merger or acquisition by one or another of said defendants) over production, distribution and sales facilities of manufacturers of household-soap;
(3) By exchanging information concerning prices; terms and conditions of sale; advertising and promotional methods, claims, and expenditures; packaging; production processes; sales; costs; and raw materials;
(4) By controlling and fixing prices at which their brands are sold by themselves and by retailers;
(5) By controlling and fixing terms and conditions of sale for their brands;
(6) By controlling and regulating their use of advertising and promotional methods and claims;
(7) By controlling, manipulating and fixing amounts which they expend for promotions and advertising;
(8) By sharing, by cross licenses to the exclusion of others, patents and patent rights controlling com-

mercially superior spray-dried soap products, and processes and apparatus for making such products;

(9) By sharing market-survey facilities;

(10) By employing in the several market areas of the United States methods of couponing, sampling, special deals and other promotional and advertising devices which are designed systematically to utilize the advantages arising from multiple established brands, shared market-survey facilities, and sales organizations operating in every market area, with [fol. 13] the purpose and effect of:

(a) Inducing retail sellers, particularly operators of self-service stores, to give defendants' brands predominant shares of the shelf space devoted to display of household-soap and household-synthetic-detergents, and

(b) Obstructing the promotion and sale of existing and new brands of household-soap and house-synthetic-detergents produced by other manufacturers;

(11) By inducing principal producers of base materials for synthetic detergents to concentrate on the production of these materials for sale to Procter, Lever and Colgate, and to discontinue or curtail production of synthetic detergents;

(12) By restricting and controlling competition among themselves and with others in the production and sale of glycerine by

(a) Curtailing the volume of glycerine production,

(b) Controlling and fixing prices at which, and the terms and conditions under which, glycerine is sold, and

(c) By exchanging information concerning glycerine prices, price policies, production, stocks, supplies, consumer demand, and imports from other countries into the United States; and

[fol. 14] (13) By doing each and all of the things described hereinafter in subparagraph 34-B of this complaint.

B. Defendants Procter, Lever and Colgate have attained, maintained, augmented, and exploited their dominance over all others engaged in the purchase and sale of principal materials used in the production of soap and synthetic detergents, and have restricted and controlled competition with each other and with all others engaged in the purchase and sale of said materials:

(1) By exchanging information concerning policies, practices and market positions for purchases of raw materials, which information related to prices offered, amounts to be purchased, prices paid and to be paid, stocks, supplies, and amounts purchased;

(2) By obtaining systematic discriminatory preferences over other purchasers of inedible tallow and grease, of other raw materials used in the production of soap;

(3) By controlling and manipulating market-price reporting mechanisms for inedible tallow and grease;

(4) By encouraging others to buy and sell inedible tallow and grease at prices based on the market-prices reported by the mechanisms referred to in subparagraph 34-B (3);

(5) By making purchases, commonly termed "confidential deals" requiring that sellers (including any participating brokers) conceal such transactions in order to avoid their affecting either the market-prices reported by the mechanisms referred to in [fol. 15] subparagraph 34-B (3), or the market positions of other buyers and sellers;

(6) By controlling, manipulating and fixing prices at which they purchase inedible tallow and grease, and other raw materials used in the production of soap;

(7) By sometimes requiring sellers of inedible tallow and grease, and of other raw materials used in soap to sell to them direct without the intervention of brokers and at other times requiring sellers to sell to them through brokers whose commissions are paid by the sellers;

(8) By dominating brokers whose commissions are paid by sellers of inedible tallow and grease, and of other raw materials used in the production of soap;

(9) By acquiring from others exclusive patent rights

controlling base materials and processes for the production of base materials, for synthetic detergents derived from vegetable and from animal fats and oils;

(10) By purchasing and agreeing to purchase substantially all of the available supplies of petroleum base materials used in the production of synthetic detergents;

(11) By inducing principal producers of base materials for synthetic detergents to concentrate on the production of base materials for sale to Procfor, Lever and Colgate, and to discontinue or curtail production of synthetic detergents; and

(12) by doing each and all of the things described in subparagraph 34-A. of this complaint.

[fol. 16] C. The defendant Association has assisted the other defendants in doing the things described in subparagraphs 34-A and 34-B of this complaint.

35. Pursuant to the aforesaid combination and conspiracy to restrain and monopolize, and to achieve and maintain the monopolization charged in paragraph 32 of this complaint, the defendants have done those things which are described in paragraph 34 of this complaint.

V

Effects

36. The effects of the combination and conspiracy alleged in this complaint have been, among others:

A. Housewives and other consumers of household-soap and household-synthetic-detergents have been and are compelled to buy household-soap and household-synthetic-detergents at prices and under market conditions dictated by defendants Procter, Colgate and Lever;

B. Other manufacturers of household-soap and household-synthetic-detergents have been excluded from the opportunity of competing freely with Procter, Colgate and Lever in the sale and distribution of said products;

C. Companies other than Procter, Colgate and Lever have been and now are being prevented from marketing

new brands of household-soap and household-synthetic-detergents;

D. Producers and sellers of inedible tallow and grease, and the butchers, processors and livestock producers from whom they obtain the fat and scrap from which inedible tallow and grease are made, have been and now are being deprived of the benefits of a free competitive market for the sale of inedible tallow and grease; and

[fol. 17] E. Grocers have been and now are being deprived of the benefits of a free competitive market in which to purchase household-soap and household-synthetic-detergents.

PRAYER

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that all the defendants have combined and conspired to restrain and monopolize interstate trade and commerce in the production and sale of household-soap and household-synthetic-detergents and in the purchase and sale of the principal materials used in soap and synthetic detergents in violation of Sections 1 and 2 of the Sherman Act.

2. That the Court adjudge and decree that the defendants Procter, Colgate and Lever have monopolized interstate trade and commerce in the production and sale of household-soap and household-synthetic-detergents and in the purchase and sale of the principal materials used in soap and synthetic detergents in violation of Section 2 of the Sherman Act.

3. That each of the defendants and each of its officers, directors, agents, employees, successors and assigns, and all other persons acting under, through or for each defendant, be perpetually enjoined and restrained from continuing, maintaining or renewing the foregoing violations and from entering into or continuing or claiming any rights under any contract, agreement or understanding in restraint of or to monopolize interstate trade and commerce in the production and sale of household-soap and household-synthetic-detergents or in the purchase and sale of the principal materials used in soap and synthetic detergents.

4. That each of the defendants Procter, Colgate and Lever be dissolved into separate and independent organi-

zations, and that each such defendant's plants and other [fol. 18] assets for the production and sale of soap and synthetic detergents be divided among the new organizations, so as to prevent continued monopolization and to restore competitive conditions.

5. That each of the defendants Procter, Colgate and Lever be required to resign its membership in The Association of American Soap and Glycerine Producers, Inc. and be enjoined from again becoming a member thereof or of any other trade association similar to the defendant Association.

6. That the defendant The Association of American Soap and Glycerine Producers, Inc. be enjoined from having as members any other defendant in this action or any person firm or corporation acquiring, pursuant to any order of dissolution entered by this Court, any of the assets of any of said defendants.

7. That the Court adjudge and decree that each of the defendants Procter, Colgate and Lever has used trademarks, patents, patent rights and technical information, owned or controlled by them, unlawfully in instituting, effectuating and maintaining the aforesaid violations of Sections 1 and 2 of the Sherman Act, and that the plaintiff have such relief with respect to the defendants' trademarks, patents, patent rights, and technical information as the Court may deem necessary or appropriate to dissipate the effects of the defendants' unlawful activities and to promote free and unfettered competition in the production and sale of household-soap and household-synthetic-detergents.

8. That the plaintiff have such other and further general and different relief with respect to the organization, functions and operations of the defendants as the Court may deem appropriate or necessary to establish free and unfettered competition in the production and sale of household-soap and household-synthetic-detrgents, as the nature [fol. 19-20] of the case may require and as the Court may deem proper in the premises.

9. That pursuant to Section 5 of the Sherman Act, an order be made and entered herein requiring such of the defendants as are not found within this District to be brought before the Court in this proceeding as parties

defendant, and directing the Marshals of the District in which they severally reside or are found to serve summons upon them.

10. That the plaintiff recover the costs of this suit.

Dated: December 11, 1952.

(S.) James P. McGranery, Attorney General. (S.) Newell A. Clapp, Acting Assistant Attorney General. (S.) Grover C. Richman, Jr., United States Attorney. (S.) Walker Smith, (S.) J. Fergus Belanger, (S.) Norman J. Futor, (S.) Robert Brown, Jr., (S.) Estella L. Baldwin, Trial Attorneys.

[fol. 20a-30] [File endorsement omitted]

[fol. 31] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ANSWER OF DEFENDANT COLGATE-PALMOLIVE-PEET COMPANY —Filed March 5, 1953

Colgate-Palmolive-Peet Company (hereinafter called Colgate), answering by its attorneys the complaint herein:

1. Denies each and every averment of paragraph 1 of the complaint, except that it admits that the complaint purports to be filed under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

2. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 2 of the complaint, except that it admits so much of the averments of paragraph 2 as pertains to Colgate.

3. A. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 3A of the complaint, except that it admits that The Procter & Gamble Company is made a defendant herein.

[fol. 32] B. Denies each and every averment of paragraph 3B of the complaint, except that it admits that Colgate-Palmolive-Peet Company is made a defendant herein; and that it is a corporation organized and existing under the laws of the State of Delaware, with principal executive offices in Jersey City, New Jersey; and that as of December 31, 1926, The Palmolive Company acquired in exchange for stock the business and assets of Peet Brothers Company and changed its name to The Palmolive-Peet Company; and that as of June 30, 1928, The Palmolive-Peet Company acquired in exchange for stock the business and assets of Colgate & Company and changed its name to Colgate-Palmolive-Peet Company; and that the complaint defines the word "Colgate," as used in the complaint, in the manner set forth in the last three sentences of paragraph 3B of the complaint.

C. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 3C of the complaint, except that it admits that Lever Brothers Company is made a defendant herein.

D. Denies each and every averment of paragraph 3D of the complaint, except that it admits that the Association of American Soap and Glycerine Producers, Inc. is made a defendant herein; and that it is a corporation organized and existing under the laws of the State of Delaware, with principal executive offices in New York, New York; and that the Association collects certain data, distributes certain information and conducts certain activities for the general benefit of those engaged in the soap, synthetic detergent, glycerine and related industries.

4. Denies knowledge or information sufficient to form a [fol. 33] belief as to the truth of the averments of paragraph 4 of the complaint, except that it admits so much of the averments of paragraph 4 as pertains to Colgate.

5. Admits the averments of paragraph 5 of the complaint, but it avers that the definition of soap contained in paragraph 5 is but one of a number of possible definitions.

6. Admits that the complaint defines the word "soap," as used in the complaint, in the manner set forth in paragraph 6 of the complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 7 of

the complaint, except that it admits that soap manufactured and sold primarily for industrial use is commonly known as industrial soap.

8. Denies each and every averment of paragraph 8 of the complaint, except that it admits that the complaint defines the term "household-soap," as used in the complaint, in the manner set forth in paragraph 8 of the complaint and that as defined household-soap can be distinguished from certain industrial soap in that the latter is sold in larger containers and to a degree in a substantially different market.

9. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 9 of the complaint, except that it admits that laundry bar soap was at one time an important category of household soap; that it has become increasingly less important than packaged soap; that prior to 1930 a product in the form of puffed, hollow beads, produced by spray-dry processes, was in- [fol. 34] vented; and that since the middle 1930s the spray-dried product has become increasingly more important than granules, powders, chips and flakes.

10. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 10 of the complaint, except that it admits that inedible tallow and grease are principal raw materials used in the production of soap and are rendered primarily from fat scrap cut from meat by butchers and meat processors, and that no exchange exists today upon which tallow and grease are traded.

11. Admits the averments of paragraph 11 of the complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 12 of the complaint.

13. Denies each and every averment of paragraph 13 of the complaint, except that it admits that the definition of synthetic detergents contained in paragraph 13 is one of a number of possible definitions.

14. Admits that the complaint defines the words "synthetic detergents," as used in the complaint, in the manner set forth in paragraph 14 of the complaint.

15. Denies knowledge or information sufficient to form a

belief as to the truth of any averment of paragraph 15 of the complaint, except that it admits that synthetic detergents manufactured and sold primarily for industrial use are commonly known as industrial synthetic detergents.

16. Denies each and every averment of paragraph 16 of the complaint, except that it admits that the complaint defines the term "household-synthetic-detergents," as used in [fol. 35] the complaint, in the manner set forth in paragraph 16 and that as defined household-synthetic-detergents can be distinguished from certain industrial synthetic detergents in that the latter are sold in larger containers and to a degree in a substantially different market, and that relatively small amounts of synthetic detergents are produced in bar form.

17. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 17 of the complaint, except that it admits that a synthetic detergent for household use made from coconut oil derivatives was marketed in the United States by Colgate beginning in the late 1930s and had attained a relatively small volume of sales prior to World War II.

18. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 18 of the complaint, except that it admits that certain s thetic detergents are now made from petroleum base materials derived from petroleum fractions and that synthetic detergent base materials derived from petroleum can be cheaper bases for cleansing agents than either inedible tallow and grease or coconut oil if the prices of those natural fats are sufficiently high.

19. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 19 of the complaint, except that it admits that synthetic detergent uses are generally coextensive with those of soap; and that synthetic detergents have certain performance advantages over soap in hard water.

20. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 20 of the complaint.

[fol. 36] 21. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 21 of the complaint, except that it admits that some

glycerine is a by-product of the manufacture of soap, and that a substantial amount of glycerine is produced as an incident of soap production.

22. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 22 of the complaint, except that it admits that at the present time and for a number of years past most categories of soap products for household use, and since their introduction most categories of synthetic detergent products for household use, have reached the consumer principally through grocery stores; and that a certain proportion of sales of these products are and for a number of years have been made direct to grocers; and that industrial soap and synthetic detergents have been and are sold among others to commercial laundries, textile manufacturers, industrial plants, office buildings and institutions, or to jobbers or wholesalers who supply them.

23. Denies each and every averment of paragraph 23 of the complaint, except that it admits that in some grocery stores the consumer himself usually removes the particular brands of commodities desired from the shelf, that in other grocery stores the clerk usually delivers the brands to the consumer in the store, and that in all grocery stores the shelf space available for soap and other commodities is limited, depending upon the size of the store; and it denies knowledge or information sufficient to form a belief as to [fol. 37] the effect, if any, which the relative prominence of display on store shelves has upon brand sales.

24. Denies each and every averment of paragraph 24 of the complaint, except that it admits that various methods of advertising and promotion of soap and synthetic detergents for household use have been developed and used, and that some of these methods entitle the consumer to a credit in cash or in kind when purchasing specified items or combinations of items.

25. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 25 of the complaint.

26. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 26 of the complaint.

27. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 27 of the complaint, except that it admits that Colgate acquired the soap business of one producer of soap for household use who was in business in 1926.

28. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 28 of the complaint.

29. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 29 of the complaint, except that it admits that Colgate expended approximately $22,000,000 in 1951 for advertising and promotion of household soap and household synthetic detergents, as those terms are defined in the complaint.

30. Denies knowledge or information sufficient to form a belief as to the truth of any averment of paragraph 30 of the complaint.

31. Denies knowledge or information sufficient to form a [fol. 38] belief as to the truth of any averment of paragraph 31 of the complaint, except that it admits so much of the averments of paragraph 31 as pertains to Colgate.

32 Denies each and every averment of paragraph 32 of the complaint.

33. Denies each and every averment of paragraph 33 of the complaint.

34. Denies each and every averment of paragraph 34 of the complaint.

35. Denies each and every averment of paragraph 35 of the complaint.

36. Denies each and every averment of paragraph 36 of the complaint.

First Affirmative Defense

37. Avers that as to each of the three acquisitions described in paragraphs 3B and 27 of the complaint which involved Colgate or its predecessor corporations, full disclosure was made to and clearance as to possible action under the Sherman Act was requested from the plaintiff through the Department of Justice at or about the time of such acquisition; that the plaintiff informed Colgate or its predecessor corporations at or about the time of each such acquisition that no action by the plaintiff was then contem-

plated; that these three acquisitions occurred in 1926, 1928, and 1930, respectively; that in reliance on these assurances and the subsequent failure of the plaintiff until the present action to raise any question as to the propriety of these acquisitions Colgate has built itself, by means of substantial investments made by both the company and the public, into a company which is able to and does sell on a national scale many competitive types of soap and syn- [fols. 39-40] thetic detergent products, but which, as the plaintiff has set forth in paragraphs 25 and 26 of the complaint, sells but a small fraction of the national sales of soap and synthetic detergents; and that it is inequitable for the plaintiff, in the face of the lapse of time since these acquisitions and Colgate's change of position, to rely in the present action upon these three acquisitions or any of them in an effort either to establish present violation of the Sherman Act as alleged in the complaint, or to justify a demand for dissolution of the nature of paragraph 4 of the prayer of the complaint whose effect would be to destroy an organization created with the full knowledge and acquiescence of the plaintiff and existing with that knowledge and acquiescence for more than twenty years.

Wherefore, the defendant Colgate-Palmolive-Peet Company prays that the complaint herein be dismissed.

O'Mara, Schumann, Davis & Lynch, By Gerald F. O'Mara, No. 1 Exchange Place, Jersey City 2, New Jersey. Cahill, Gordon, Zachry & Reindel, By Mathias F. Correa, 63 Wall Street, New York 5, New York, Attorneys for Defendant, Colgate-Palmolive-Peet Company.

Dated, Jersey City, New Jersey, March 5, 1953.

[fol. 40a] [File endorsement omitted]

ACKNOWLEDGEMENT OF SERVICE (Omitted in printing)

[fol. 41] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ANSWER OF THE PROCTER & GAMBLE COMPANY—Filed March 5, 1953

Gwynne Building, 6th & Main Streets, Cincinnati 1, Ohio

The Procter & Gamble Company, through its attorneys hereinafter named, answering each paragraph of the complaint filed herein, alleges:

1. This defendant has not violated and does not intend to violate the statutes referred to in paragraph 1 of the complaint and there is no necessity for any order or decree to be issued preventing any such violation or for any other relief.

2. This defendant's wholly-owned subsidiary, The Procter & Gamble Distributing Company, has a sales office within the District of New Jersey, but it is denied that this defendant has such sales office within the said District and it denies that it is an inhabitant of, is found in, has an agent in, or transacts business within such District. The other [fol. 42] averments of paragraph 2 of the complaint do not concern this defendant, and this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

3A. In connection with paragraph 3A of the complaint, this defendant denies that it carries on its business through wholly-owned subsidiaries. The other averments of paragraph 3A are not denied.

3B. The averments of paragraph 3B of the complaint do not concern this defendant, and this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

3C. The averments of paragraph 3C of the complaint do not concern this defendant, and this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

3D. The Association of American Soap and Glycerine Producers, Inc. (hereinafter sometimes called the "Association") is a Delaware corporation with its principal offices in New York, New York. It is alleged that the authorized purposes and activities of the Association are set out in its charter, which is known to the plaintiff. The Association collects certain statistical information from its members and from other sources, including the United States Government, which is properly and legally collectible by the Association, and the Association properly and le- [fol. 43] gally distributes certain summary information to its members and to the United States Government and to others. This defendant denies the other averments of paragraph 3D of the complaint and alleges that so far as the relations between the Association and this defendant are concerned, there were no activities on the part of either the Association or this defendant which were in any manner related to the charges made in the complaint against the Association and against this defendant.

4. This defendant manufactures and sells soap, synthetic detergents, glycerine, and some other products.

5. This defendant does not admit that the plaintiff's definition of soap as set forth in paragraph 5 of the complaint is a universally accepted definition. The averments in the first sentence of paragraph 5 are denied.

6. This defendant does not admit that the plaintiff's definition of soap as set forth in the complaint is a universally accepted definition.

7. This defendant is without knowledge or information sufficient to form a belief as to the truth of averments of paragraph 7 of the complaint. In connection with this paragraph and with paragraphs 9, 15, 17, 18, 20, 21, 22, 25, 26, 27, 28, 29 and 30 of the complaint, in order to have sufficient knowledge or information to form a belief as to the truth of all of such averments, it would be necessary to have information beyond the scope of the defendant's own business, knowledge and information, and to have knowledge or information on an industry-wide basis or

[fol. 44] concerning a different industry such as rendering or petroleum production, and in some instances, knowledge concerning the defandant's competitors, Lever and Colgate and others, none of which the defendant has or knows in sufficient detail to answer.

8. This defendant does not admit that the plaintiff's definition of household soap as set forth in the first sentence of paragraph 8 of the complaint is a universally accepted definition. The averments in the last sentence of paragraph 8 of the complaint are denied.

9. This defendant admits that in the early 1930's a product in the form of puffed, hollow beads, produced by spray-dry processes, became increasingly important. Except as herein admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9 of the complaint.

10. Inedible tallow and grease are principal raw materials used in the production of soap and are rendered primarily from fat scrap cut from meat by butchers, packers, and other meat processors. These materials are processed by approximately 700 renderers and by meat packers. No exchange exists today. Except as herein admitted, this defendant is without knowledge or information [fol. 45] sufficient to form a belief as to the truth of the averments of paragraph 10 of the complaint.

11.

12.

13. This defendant does not admit that the plaintiff's definition of synthetic detergents as set forth in paragraph 13 of the complaint is a universally accepted definition. The averments of paragraph 13 are denied.

14. This defendant does not admit that the plaintiff's definition of synthetic detergents as set forth in paragraph 14 of the complaint is a universally accepted definition.

15. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 15 of the complaint.

16. This defendant does not admit that the plaintiff's definition of household synthetic detergents as set forth in paragraph 16 of the complaint is a universally accepted definition. The averments in the last sentence of paragraph 16 of the complaint are denied.

17. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in the first and third sentences of paragraph 17 of the complaint.

18. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 18 of the complaint.

[fol. 46] 19. The averments in the first and second sentences of paragraph 19 of the complaint are not denied. The other averments of paragraph 19 are denied.

20. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 20 of the complaint.

21. Most glycerine is produced as an incident of soap-making, but this defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph 21 of the complaint.

22. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in the first four sentences of paragraph 22 of the complaint. Although the averments in the last sentence of paragraph 22 are admitted, this defendant alleges that household soaps and household synthetic detergent products (as those terms are defined in the complaint) also are sold to types of purchasers listed in this last sentence.

23. As to the first sentence of paragraph 23 of the complaint the consumer himself usually, but not always, removes the brands from the shelf. The second and third sentences are sometimes, but not universally, true. As to the fourth sentence, in all grocery stores there is a limited amount of shelf space which can be used for all items sold therein. Except as is herein admitted, the averments of paragraph 23 are denied.

[fol. 47] 24. Various forms of advertising and promotional methods—rather than devices—have been developed and used throughout the years to induce the purchase of household soap and household synthetic detergents, as these methods have been developed and used for the sale of many other products to the public. One of these methods sometimes used offers the consumer a credit in cash or in kind when purchasing special items or combinations of items. Promotions are sometimes used in large market areas rather than on a nationwide basis, as is also frequently

the case with products of other types. Except as herein admitted, the averments of paragraph 24 of the complaint are denied.

25. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 25 of the complaint. Further, in connection therewith, this defendant alleges that in addition to household synthetic detergents as defined in the complaint there are other articles of commerce which may be substituted for household soap as defined in the complaint, and are so substituted. All such products compete in the same markets and are sold in the same channels of distribution.

26. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 26 of the complaint. Further, in connection therewith, this defendant alleges that in addition to household soap as defined in the complaint there are other articles of commerce which may be substituted for household syn- [fol. 48] thetic detergents as defined in the complaint, and are so substituted. All such products compete in the same markets and are sold in the same channels of distribution.

27. In connection with the last sentence of paragraph 27 of the complaint, it is alleged that this defendant acquired certain plants or other assets of other soap companies in the period from 1926 to 1937. All of said acquisitions occurred more than fifteen years prior to the institution of this action. None of such acquisitions was in any true sense a purchase of a "business". In most instances the assets other than real estate, buildings and equipment were negligible. Accordingly, the defendant denies the averments in the last sentence of paragraph 27 in so far as they apply to this defendant. As to the other averments of paragraph 27, the defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

28. In 1926 there were no household synthetic detergents, as defined in the complaint. As to the other averments of paragraph 28 of the complaint, the defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

29. The figures stated in paragraph 29 of the complaint as to this defendant are approximately correct. As to the

[fol. 49] other averments of paragraph 29 this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

30. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 30 of the complaint.

31. This defendant denies the averments of paragraph 31 of the complaint in so far as they relate to this defendant. As to the other averments of paragraph 31 this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

32. The averments of paragraph 32 of the complaint are denied. In connection with paragraph 32, this defendant alleges that it has not engaged and is not engaged in any combination or conspiracy either in restraint of trade and commerce or to monopolize such trade and commerce in connection with household soaps or household synthetic detergents or any other products. This defendant is not monopolizing and has never monopolized such trade and commerce and has done nothing to contribute to any restraint of trade or monopoly.

33. This defendant does not, alone or in combination or conspiracy with others, have any monopoly or position of dominance in the fields of household soap, household synthetic detergents, principal materials used in soap and synthetic detergents, or in any other field, and has sought no such monopoly or position of dominance. It does not, alone or in combination or conspiracy with others, restrain, [fol. 50] restrict, or control competition with anyone in any of such fields, has not done so, has not sought to do so, and does not seek to do so. This defendant denies the averments of paragraph 33, and each subdivision thereof.

34A. This defendant denies the averments of paragraph 34A, and each subdivision thereof, of the complaint.

34B. This defendant denies the averments of paragraph 34B, and each subdivision thereof, of the complaint.

34C. This defendant denies the averments of paragraph 34C of the complaint.

35. This defendant denies the averments of paragraph 35 of the complaint.

36A. This defendant denies the averments of paragraph 36A of the complaint.

36B. This defendant denies the averments of paragraph 36B of the complaint.

36C. This defendant denies the averments of paragraph 36C of the complaint.

36D. This defendant denies the averments of paragraph 36D of the complaint.

36E. This defendant denies the averments of paragraph 36E of the complaint.

Generally and in connection with paragraph 36A to E, [fol. 51] it is alleged that the defendant's practices, conduct and transactions in the operation of its business are in no manner unfair to its competitors or those with whom it deals, but on the other hand are beneficial to its customers, direct and ultimate, and to the economy of the country. By these practices, the defendant, among other things, provides low cost products, continuous employment and higher compensation to employees, and better and constantly improved articles for public consumption. The method in which defendant has conducted its business and still conducts its business is in large part responsible for these results. In equity there is no economic or other justification for this action.

Further Defense

37. Plaintiff for many years prior to the filing of the complaint has known or has had reasonable cause to know of the business practices, conduct and transactions of this defendant. Such knowledge has been acquired not only from general information but also through specific inquiries addressed to this defendant and through special and comprehensive investigations. Many of the business practices, conduct and transactions upon which the averments of the complaint assume to be based, occurred a decade or more ago and were fully known to the plaintiff either at the time of their occurrence or at least ten years before the institution of this action. For example, knowledge concerning the purchase by defendant of assets or property of others, referred to in paragraph 27 of the answer, came to plaintiff [fol. 52] at about the time of such purchases during the approximate period from 1926 to 1937.

38. Ten years before the date of the complaint the plaintiff made and concluded a full investigation of the existing

and previous business practices, conduct and transactions of this defendant and in connection therewith subpoenaes were issued at the request of the plaintiff to the defendant and complied with by supplying the material called for. Immediately thereafter the defendant considered that the whole matter was ended.

39. Subsequently the business practices, conduct and transactions of the defendant have not only been entirely legal, as they were before, but have also been conducted with such meticulous care as not to be subject to any just criticism of any kind. At no time prior to the filing of this complaint has the plaintiff claimed in any civil action that any of defendant's business practices, conduct and transactions has been unlawful as contended in the complaint herein or in any like manner.

40. In May, 1951, at the instance of the plaintiff, documents and witnesses were subpoenaed in connection with a Grand Jury investigation in this Court, some of these documents being those covered by prior investigations and subpoenaes. It was apparent that the purpose of the investigation was to attempt to establish violation of law substantially upon the same contentions as are set forth in this complaint. The similarity between the matters presented to the Grand Jury and the transactions referred to in the complaint is illustrated by the fact that the plaintiff has [fol. 53] now asserted that it will seek to use in this action all or a substantial part of the documentary evidence subpoenaed in the Grand Jury proceeding.

41. The plaintiff presented voluminous evidence to the said Grand Jury over a period of approximately eighteen months. The Grand Jury completed its work in November 1952, and deliberately did not return an indictment or presentment. Despite the fact that the plaintiff's presentation was *ex parte*, and that this defendant had no opportunity to cross-examine or to present any defensive evidence, and despite the negative action of the 1951-1952 Grand Jury, the plaintiff has brought this present action on charges relating to alleged transactions extending back for decades and covering matters presented to the Grand Jury and known by the plaintiff for many years.

42. Over the period covered by the allegations of this complaint, that is, a period of twenty-five or thirty years prior to the institution of this action, documents which

would be relevant to this action (including papers which plaintiff received many years before and has not returned to this defendant) have become unavailable, and persons whose testimony would be relevant to the defense of this action have died or have otherwise become unavailable. Furthermore, during the period covered by this complaint, with full knowledge of the plaintiff, many individuals have invested in the securities of the defendant, and the defendant itself has invested large sums of money in conducting its business.

43. For the reasons hereinabove stated, the claims and [fol. 54] charges now made by the plaintiff in this complaint are stale claims; and the institution of this action, after plaintiff's full knowledge over a long period of time, is unreasonably harassing and oppressive.

44. The defendant is informed and believes that the matters stated above clearly show that the charges of and relief sought in the complaint cannot be sustained either in law or in equity or in good conscience, and that the plaintiff is estopped from relitigating the matters set forth in the complaint.

45. The defendant is informed and believes and alleges that the matters stated above not only require an immediate and radical reduction in the time and scope of the matters properly to be considered in this action, but also constitute a complete bar to the complaint and the relief sought in the complaint.

Wherefore, having fully answered the complaint herein, defendant, The Procter & Gamble Company, demands that the relief sought by the plaintiff be denied and that judgment be entered dismissing the complaint, at plaintiff's costs.

Toner, Crowley, Woelper & Vanderbilt, By H. Edward Toner, A Member of the Firm, 810 Broad [fols. 55-56] Street, Newark, New Jersey. Dinsmore, Shohl, Sawyer & Dinsmore, By Richard W. Barrett, A Member of the Firm, 1218 Union Central Building, Cincinnati 2, Ohio. Dwight, Royall, Harris, Koegel & Caskey, By Kenneth C. Royall, A Member of the Firm, 100 Broadway New York 5, New York, Attorneys for defendant, The Procter & Gamble Company.

[fol. 56a] ACKNOWLEDGMENT OF SERVICE (omitted in printing)

[File endorsement omitted.]

[fol. 57] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ANSWER OF THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.—Filed March 5, 1953

Comes now the Association of American Soap and Glycerine Producers, Inc., a corporation, hereinafter designated as Defendant Association, by its Counsel, and makes this its Answer to the Complaint filed on behalf of the United States of America against it and other Defendants.

1. Defendant Association admits the allegation of Paragraph 1 of the Complaint to the effect that the Complaint was filed under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, but denies that it has ever entered into, or in any way participated in, any unlawful contract, combination or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, as has ever monopolized, or attempted to monopolize, or combined, or conspired, with any of the other defendants' herein, or with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, in the manner alleged in the Complaint herein, or that it has otherwise ever violated either Section 1 or Section 2 of the aforesaid Act in the manner alleged in the Complaint, or otherwise.

[fol. 58] 2. In answer to Paragraph 2, Defendant Association states that since no allegation therein made concerns this Defendant or its activities in any way, no further

answer is required of it, but in any event it does not have knowledge or information sufficient to enable it to form any belief with respect to the truth of such allegations.

3. In answer to Sub-paragraphs A, B and C of Paragraph 3, Defendant Association states that since no allegation therein mde concerns this Defendant in any way, no further answer is required of it, but in any event it does not have knowledge or information sufficient to enable it to form any belief with respect to the truth of such allegations.

In answer to Sub-paragraph D of Paragraph 3, the Defendant Association admits that it is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices in New York, New York. Defendant Association further admits that it collects, from bulletins issued by the various departments of the Plaintiff, from daily newspapers and from trade journals, certain statistical information relating to the manufacture, sales, and use of soap, synthetic detergents, glycerine, and of materials used in the manufacture of soap and synthetic detergents and also of some kindred products and that the Association makes such information available to its members and to others. Defendant Association further admits that it collects from its members certain statistical information relating to the sale of soap and synthetic detergents, which information it subsequently distributes to its members and to others in summary form which does not reflect any specific information relative to any member's position, relatively or otherwise, with respect to the various fields of activity to which such statistical information pertains. Defendant Association denies that it coordinates the activities of any concerns engaged in the manufacture, sale, use and promotion of soap, synthetic detergents, glycerine, or of materials used therein or of any kindred products. Defendant Association denies that it represents any concerns engaged in the manufacture, sale, use and promotion of soap, synthetic detergents, glycerine, or of materials used therein or of any kindred products in their relations with others except to the extent that it does attempt to increase the good will for and public acceptance [fol. 59] of all soap, synthetic detergents and glycerine. Except as herein admitted specifically Defendant Associa-

tion denies each and all of the allegations of Sub-paragraph 4 of Paragraph 3.

4. In answer to Paragraph 4, Defendant Association states that since no allegation therein made concerns this Defendant in any way, no further answer is required of it.

5. In answer to the first sentence of Paragraph 5, Defendant Association admits that soap has cleansing properties and that soap can be and is produced in the manner alleged but denies that soap is produced only in such manner. Defendant Association admits the allegations of the second and third sentences of Paragraph 5.

6. Since Paragraph 6 merely alleges the meaning which the Plaintiff applies to the word "soap" the Defendant Association states that it does not believe any answer with respect thereto is required of it, but it does not admit that such definition should be accepted as a correct definition. Defendant Association admits that the correct definition of the word "soap" includes, among others, the types of products named.

7. Defendant Association does not have information or knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 7.

8. Since the first sentence of Paragraph 8 merely alleges the meaning which the Plaintiff applies to the term "household soap", the Defendant Association does not believe any answer with respect thereto is required of it, but does not admit that such definition should be accepted as constituting a correct definition. Insofar as the last sentence of Paragraph 8 is concerned, Defendant Association denies that the method of packaging, or the size thereof, or the distribution channel used, is a distinguishing characteristic as to whether soap will be used in the household or elsewhere.

9. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 and therefore denies all of such allegations except that it admits that in the 1920's chips and flakes were important types of packaged soap and that in the 1930's soap produced by the spray dry processes did become increasingly important.

[fol. 60] 10. Defendant Association admits that inedible

tallow and grease are among the principal raw materials used in the production of soap. Insofar as the third sentence of Paragraph 10 is concerned, Defendant Association states that it is without knowledge or information sufficient to form a belief as to what the annual imports of inedible tallow and grease amounted to for the years 1926 through 1941, both inclusive, but also states, on information and belief, that since 1942 the annual imports of inedible tallow and grease, as publicly reported by various departments of the Plaintiff in the first instance and as subsequently reported by Defendant Association to its members and to others upon the authority of such government reports, has been less than 2 per cent of the domestic production for each such year except for the years 1942 through 1945, both inclusive. Insofar as the fourth and fifth sentences of Paragraph 10 are concerned, Defendant Association states that it is without knowledge or information sufficient to form a belief with respect to the truth of the allegations therein made except that it believes that no exchange exists, at present, for trading of inedible tallow or grease.

11. Defendant Association states, on information emanating from the Plaintiff, that it believes the allegations of Paragraph 11 are true.

12. Defendant Association states, on information emanating from the Plaintiff, that it believes the allegations of Paragraph 12 are true.

13. Defendant Association admits that synthetic detergents are cleansing agents, synthetisized principally from petroleum derivatives, from derivatives of vegetable oils or from animal fats or oils or from combinations of such derivatives, but denies that the definition of such products as non-soap cleansing agents should be accepted as being a correct definition. Except as herein specifically admitted, Defendant Association denies the allegations of Paragraph 13.

14. Since Paragraph 14 merely alleges the meaning which the Plaintiff applies to the term "synthetic detergents," the Defendant Association states that it does not believe any answer with respect thereto is required of it, but it does not admit that such definition should be accepted as a correct definition.

[fol. 61] 15. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15.

16. Since the first sentence of Paragraph 16 merely alleges the meaning which the Plaintiff applies to the term "household synthetic detergent," Defendant Association does not believe any answer with respect thereto is required of it, but it does not admit that such definition should be accepted as being a correct definition. Insofar as the second sentence of Paragraph 16 is concerned, the Defendant Association states, on information and belief, that the allegation therein contained is true. Insofar as the last sentence of Paragraph 16 is concerned, the Defendant Association denies that the method of packaging, or the size thereof, or the distribution channel used, is a distinguishing characteristic as to whether synthetic detergents will be used in the household or elsewhere.

17. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17, except it does admit that synthetic detergents made from fatty alcohol derivatives first appeared on the market in the United States in the 1930's.

18. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 18.

19. Defendant Association admits that the usefulness of synthetic detergents is generally co-extensive with those of other soaps and that synthetic detergents may have certain performance advantages over other soaps in hard water. As to the last sentence of Paragraph 19, Defendant Association states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations made therein.

20. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 20 that of the combined total dollar sales of household soap and household synthetic detergents in 1951 household soap constituted about 60 per cent and household synthetic detergents 40 per cent.

21. Defendant Association admits that glycerine may be a by-product of the manufacture of soap and that the ma-

jority of glycerine is produced as an incident of soap production, but also avers that substantial amounts of glycerine are produced otherwise. Insofar as the last [fol. 62] sentence of Paragraph 21 is concerned, Defendant Association states that it is without knowledge or information to form a belief as to the truth of the allegations therein made.

22. Defendant Association admits that some types of soap which are used for household purposes have reached the consumer principally through the grocery stores and that, generally, synthetic detergents for household use have followed the same distribution channels. Defendant Association states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation in the third sentence of Paragraph 22 to the effect that at least two-thirds of household soaps and household synthetic detergents are bought by consumers from the shelves of self-service grocery stores. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of the fourth sentence. Defendant Association admits that industrial soap and industrial synthetic detergents are sold, in part, to the outlets mentioned in the last sentence of Paragraph 22.

23. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23.

24. Defendant Association admits that various forms of advertising and promotional methods have been developed and used throughout the years to induce the purchase of soap. Some of these methods entitle the consumer to a credit in cash or in kind when purchasing specified items or a combination of items. Defendant Association is without knowledge or information sufficient to form a belief as to how the aforesaid advertising and promotional methods are used since its activities are in no way related to the retail distribution of soap or synthetic detergents. Except as herein admitted, the Defendant Association denies the allegation of Paragraph 24.

25. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25.

26. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 26.

27. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 27.

28. Defendant Association admits that in 1926 there were no household synthetic detergents and that consequently [fol. 63] there were no producers of such products. In answer to the second sentence of Paragraph 28, Defendant Association states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

29. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 29.

30. Defendant Association is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 30.

31. In answer to Paragraph 31 Defendant Association states that since no allegations therein made concern this defendant, or its activities in any way, no further answer required of it, but in any event, it does not have knowledge or information sufficient to enable it to form any belief with respect to the truth of such allegations.

32. In answer to the first sentence of Paragraph 32, Defendant Association denies that it has engaged in, or participated in, any combination or conspiracy in restraint of, or to monopolize, any trade and commerce among the several states with respect to the production and sale of soap or synthetic detergents in violation of Section 1 or Section 2 of the Sherman Act (15 U.S.C. Sections 1 and 2) or in violation of any other law of the United States of America, and further states that insofar as the allegations of such sentence apply to the other Defendants herein it does not have knowledge or information sufficient to enable it to form any belief with respect to the truth of such allegations. In answer to the second sentence of Paragraph 32, Defendant Association states that since no allegation therein made concerns this Defendant or its activities in any way, no further answer is required of it, but in any event it is without knowledge or information sufficient to

enable it to form any belief with respect to the truth of such allegations. In answer to the third sentence of Paragraph 32, Defendant Association denies that it has committed violations of Sections 1 or 2 of the Sherman Act or of any other lawful statute of the United States of America under any circumstances whatsoever.

33. Defendant Association denies that it has participated in, or is now participating in, any combination, conspiracy, or continuing concert of action with any, or all, of the other Defendants herein, which has as its principal, or other [fol. 64] objectives the results set forth in Sections (1) and (2) of Sub-paragraph A of Paragraph 33 or as set forth in Sections (1) and (2) of Sub-paragraph B of Paragraph 33. Insofar as any activity on the part of Defendant Association is alleged in Paragraph 33 in its entirety, or in any of its Sub-paragraphs or Sections, Defendant Association specifically denies such allegations. Insofar as any activity, or activities, of other Defendants herein is alleged in Paragraph 33 in its entirety, or in any of its Sub-Paragraphs or Sections, Defendant Association is without knowledge or information sufficient to enable it to form any belief with respect to the truth of such allegations.

34. In answer to Paragraph 34, Defendant Association denies that it has assisted any of the other Defendants in doing any of the things described in Sup-paragraph 34-A, including all the numbered Sections and Sub-sections thereof, or in doing any of the things described in Sub-paragraph 34-B, including all the numbered Sections and Sub-sections thereof. Insofar as any activities of other Defendants herein are alleged or referred to in Sub-paragraph 34-A and Sub-paragraph 34-B, Defendant Association is without knowledge or information sufficient to form any belief with respect to the truth of such allegations.

35. Defendant Association denies that it has participated in any of the activities alleged in Paragraph 35, and states that so far as the other Defendants are concerned it is without knowledge or information sufficient to form a belief as to the truth of such allegations.

36. Defendant Association denies that it has ever engaged in any combination or conspiracy, with any or all of the other Defendants herein, or with anyone else, for the purpose of, or with the result of producing the effects

specifically alleged in Sub-paragraphs A, B, C, D and E of said Paragraph 36. Insofar as any activities of the other Defendants herein are alleged or referred to in Paragraph 36, the Defendant is without knowledge or information sufficient to form any belief in respect to the truth of such allegations.

Wherefore, Defendant Association, having fully an-[fols. 65-66] swered the Complaint herein, requests that the Plaintiff's prayers in said Complaint, insofar as they involve this Defendant, be denied, and that the Complaint herein be dismissed as to this Defendant.

Dated March 5, 1953.

McCarter, English & Studer, Attorneys of Defendant The Association of American Soap and Glycerin Producers, Inc., 11 Commerce Street, Newark 2, New Jersey. By (S.) Augustus C. Studer, Jr., A Member of the Firm.

Of Counsel Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Ave., N. W., Washington 5, D. C. By (S.) James T. Welch, A Member of the Firm.

[fol. 66a] Acknowledgment of Service (omitted in printing)

[File endorsement omitted]

[fol. 67] In the United States District Court for the District of New Jersey

[Title omitted]

Answer of Lever Brothers Company—Filed March 5, 1953

Now comes Lever Brothers Company, a corporation organized and existing under the laws of the State of Maine (hereafter sometimes referred to as "this defendant"), one

of the defendants in this action and, by its attorneys, answers the complaint as follows:

1. Answering Paragraph 1 of the complaint, this defendant denies that it has ever entered into, or in any manner become a party to, any agreement, combination or conspiracy of any kind whatsoever in violation of the laws of the United States and denies that it has been or now is a party to any unlawful contract, combination or conspiracy in restraint of trade, or to monopolize trade, or otherwise, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 2 of the complaint except that this defendant admits that it operates a manufacturing plant and that it transacts business within the District of New Jersey.

[fol. 68] 3. Answering Paragraph 3 of the complaint, this defendant admits that Lever Brothers Company is made a defendant herein and that said company was incorporated in the State of Maine and maintains principal executive offices in New York, New York, and avers that it is without knowledge or information sufficient to admit or deny the allegations as to the other defendants named in Paragraph 3 of the complaint, except that it admits that the Association of American Soap and Glycerine Producers collects and disseminates certain information for the general benefit of all those engaged in the manufacture, sale, and use of soap, synthetic detergents, glycerine and related products.

4. This defendant is without knowledge or information sufficient to admit or deny the allegations of Paragraph 4 of the complaint, except that this defendant admits that it manufactures and sells soap, synthetic detergents, glycerine and other products.

5. This defendant avers that the definition of soap in Paragraph 5 is a matter upon which qualified experts differ. Since this defendant cannot admit the validity of the definition, the averments of this Paragraph 5 are denied.

6. Answering Paragraph 6, this defendant admits that the person signing the complaint intended that the word "soap" when used in the complaint should be given the meaning set forth in this paragraph.

7. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 7 of the complaint.

[fol. 69] 8. Answering Paragraph 8 of the complaint, this defendant admits that the person signing the complaint intended that the term "household-soap" when used in the complaint should be given the meaning set forth in this paragraph, but this defendant alleges that the term "household-soap" is not used in the trade with the meaning ascribed to it in this Paragraph 8 and in the complaint; that the definition in this paragraph is misleading and inaccurate and that, accordingly, the use of the term "household-soap" throughout the complaint is misleading and inaccurate; and that this defendant does not accept, adopt, or approve for any purpose whatsoever the definition of the term "household-soap" in this paragraph or its use subject to this definition in the complaint. This defendant further specifically denies the allegation in the last sentence of Paragraph 8.

9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 9, except that it denies the last sentence thereof, and except that this defendant admits that since the late 1920's laundry bar soap has become increasingly less important as a cleansing agent.

10. Answering Paragraph 10 of the complaint, this defendant admits that inedible tallow and grease are principal raw materials used in the production of soap, and are rendered primarily from fat scrap cut from meat by butchers and meat processors, but avers that it is without knowledge or information sufficient to form a belief as to the truth of the other averments of said paragraph.

[fol. 70] 11. This defendant admits the averments of Paragraph 11 of the complaint.

12. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 12.

13. This defendant avers that the definition of synthetic detergents in Paragraph 13 is a matter upon which qualified experts differ, and that the definition as stated is inaccurate and incomplete. Since this defendant cannot

admit the validity of the definition, the averments of this Paragraph 13 are denied.

14. Answering Paragraph 14 of the complaint, this defendant admits that the person signing the complaint intended that the words "synthetic detergents" when used in the complaint should be given the meaning set forth in this paragraph.

15. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 15 of the complaint.

16. Answering Paragraph 16 of the complaint, this defendant admits that the person signing the complaint intended that the term "household-synthetic-detergents" when used in the complaint should be given the meaning that is set forth in the first sentence of this paragraph. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of the second sentence in this paragraph. This defendant denies the averments of the last sentence of this Paragraph 16.

17. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 17 of the complaint.

[fol. 71] 18. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 18 of the complaint.

19. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 19 of the complaint except that it admits that synthetic detergents have some of the same uses as soap.

20. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 20.

21. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 21 of the complaint, except that it admits that some glycerine is a by-product of the manufacture of soap.

22. Answering Paragraph 22 of the complaint, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Para-

graph 22 of the complaint, except that it admits that, among other outlets, soaps and synthetic detergents are distributed to consumers through grocery stores, and that distribution of such products has been made direct to grocers as well as through jobbers or wholesalers, and that industrial soaps and synthetic detergents are sold to a variety of purchasers.

[fol. 72] 23. Answering Paragraph 23 of the complaint, this defendant denies each and every averment of Paragraph 23, except that it admits that in self-service grocery stores the consumer generally serves himself and that in non-self-service grocery stores the clerk generally serves the commodities which the customer desires. This defendant denies, however, that the classification of grocery stores as "self-service" and "non-self-service" is either accurate, complete or reliable and avers that many grocery stores are in part self-service and in part non-self-service.

24. This defendant denies the averments of Paragraph 24 of the complaint, except that it admits that it has developed and used throughout the years various methods of advertising and promotion to encourage the purchase of its brands of soap and synthetic detergents in competition with the brands of other manufacturers. Defendant further avers that these methods are varied and diverse.

25, 26, 27 and 28. This defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in Paragraphs 25, 26, 27 and 28 of the complaint.

29. This defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in Paragraph 29 of the complaint, except that this defendant admits that its expenditures for 1951 for advertising and promotion of its soap and synthetic detergents were approximately $27,000,000 including therein all elements which are included in defendant's accounting procedures.

[fol. 73] 30. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 30 of the complaint.

31. Answering Paragraph 31 of the complaint, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph, except that this defendant admits that it has manufacturing

plants engaged in producing, and sales offices engaged in selling, soaps and synthetic detergents to purchasers in states other than the states in which the said plants and sales offices are located.

32, 33, 34 and 35. This defendant denies each and every averment of Paragraphs 32, 33, 34 and 35, and each subparagraph thereof, of the complaint insofar as those averments relate to this defendant, and otherwise avers that it is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraphs.

36. This defendant denies each and every averment contained in Paragraph 36 of the complaint. Further answering Paragraph 36, this defendant avers that in the manufacture and sale of soap and synthetic detergents and in the purchase of inedible tallow and grease and all other raw materials it is engaged in the keenest competition with all other manufacturers and sellers of such products; that it has continuously invested substantial sums in research and development designed to improve the quality of its products; that it has speedily made available the results of its research and development; that it has continuously maintained a sales policy designed to bring to wholesale and retail distributors the widest variety of its products of the highest possible quality at the lowest possible price; and that the result of such policies has been to provide competition with the products of other manufacturers at all levels of distribution and to bring to [fol. 74] consumers soap products and synthetic detergents of superior quality at low competitive prices. It further avers that such policies have conferred substantial benefits upon the suppliers of raw materials used in the manufacture of soap products and synthetic detergents, upon distributors, and upon the consumers of those products. This defendant further specifically denies that it is or has been a party to any combination or conspiracy or that its actions or the effects thereof may be considered in conjunction with the actions or effects thereof of any of the other defendants, and avers that it is informed and believes that from on or about June 1, 1951, to November 30, 1952, attorneys for the plaintiff Department of Justice presented to a grand jury convened in this district vast amount of testimony and documentary evidence relating

to precisely the same subjects that are alleged in this complaint and that said grand jury refused or failed to return an indictment.

Affirmative Defense

37. In recent years and particularly since the end of World War II in 1946, the nature and character of the business in which this defendant is engaged has sharply changed in terms of types of products, manufacturing processes and facilities, competitive position and marketing policies and practices. These changes are due in part to the introduction of synthetic detergents, changes in products resulting therefrom and from other factors, [fol. 75] changes in the structure and characteristics of distribution outlets, general economic factors and many other causes. These changes have been accompanied by changes in the position, policies and practices of this defendant.

38. This defendant's management, including both its Board of Directors and all of its executive officers in charge of marketing or purchasing, is composed entirely of persons who have been officers of the Company for only a few years. None of the present directors of the defendant was either a director or an executive officer of the defendant prior to July, 1949. The President and chief executive of the defendant was elected to his position on May 2, 1950, and was not connected with the defendant prior to that date. Since the middle of 1946, the management of the defendant has undergone two complete reorganizations extending throughout the policy-making levels of the organization. Not a single person who prior to July, 1949, was a president or vice president of the defendant, or head of any of its divisions dealing with the buying of raw materials or the selling of finished products, is now serving with the defendant in any capacity.

39. This defendant does not occupy a dominant position in the soap and synthetic detergent industry and its share therein is relatively subordinate and has decreased in recent years (Complaint, Paragraphs 25 and 26). According to the complaint, in 1951, this defendant's share of the total sales of synthetic detergents was only ten percent (Complaint, Paragraph 26), and its share of the total

sales of soap and soap products was 21 percent (Complaint, Paragraph 25). Each of defendant's products competes [fols. 76-77] with products of other manufacturers; many different products of different manufacturers are available and compete for the same uses; and defendant is and has been in no position to restrain competition or to monopolize, alone or in combination with others, with respect to raw materials or finished product and defendant has not and does not attempt to do so.

40. Since the complaint is based in essential part upon events long prior to the changes alleged in the foregoing, it fails to state a claim upon which relief could be granted even if it were assumed, which we deny, that except for such changes the allegations of the complaint could be proved and relief granted thereon.

Wherefore, this defendant prays that the relief sought by the plaintiff be denied, that judgment be entered for this defendant, that the complaint be dismissed, and that *and that* it be granted such other and further relief as may be warranted.

(S.) Earle Ogden Bennett, Bailey, Schenck & Bennett, 744 Broad Street, Newark 2, New Jersey. (S.) Abe Fortas, Arnold, Fortas & Porter, 1229 19th Street, N. W., Washington 6, D. C. (S.) William L. McGovern, Arnold, Fortas & Porter, 1229 19th Street, N. W., Washington 6, D. C. Attorneys for Defendant, Lever Brothers Company.

Arnold, Fortas & Porter, 1229 19th Street, N. W., Washington 6, D. C. Of Counsel

---

[fol. 77a] [File endorsement omitted]

[fol.78] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS UNDER RULE 34—Filed March 6, 1953

The plaintiff moves the Court for an order requiring defendant The Procter & Gamble Company to produce on or before 10 A. M., March 30, 1953, in the office of the Clerk of the United States District Court, District of New Jersey, Newark, New Jersey, and permit the plaintiff to inspect and remove from the custody of the Clerk for the purpose of copying by photostating or other appropriate means, certain documents identified by numbers affixed thereto by defendant, such numbers being listed in Exhibit "A" attached hereto. Said documents constitute or contain evidence relevant or material to the issues involved in this action as is more fully shown in Exhibit "B" attached hereto. Said defendant has possession, custody, or control of said documents.

Walker Smith, J. Fergus Belanger, Norman J. Futor, Robert Brown, Jr., Estella L. Baldwin, Trial Attorneys, United States Department of Justice.

Dated March 6, 1953.

[fol. 79] NOTICE OF MOTION

To: Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey. Dinsmore, Shohl, Sawyer & Dinsmore, Union Central Building, Cincinnati, Ohio. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York. Arnold, Fortas and Porter, 1229 Nineteenth Street, N.W., Washington, D. C. Cahill, Gordon, Zachry & Reindel, 63 Wall Street, New York, New York. Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N.W., Washington, D. C. Bailey, Schenck & Bennett, 744 Broad Street, Newark, New Jersey. O'Mara, Schuman, Davis & Lynch, 1 Exchange Place,

Jersey City, New Jersey. McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 23d day of March, 1953, at 10:00 A.M., or at such other time thereafter as may be set at the convenience of the Court on notice to you.

Walker Smith, J. Fergus Belanger, Norman J. Futor, Robert Brown, Jr., Estella L. Baldwin, Trial Attorneys, United States Department of Justice.

Dated: March 5, 1953.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 80] EXHIBIT "A" TO MOTION

1-282
1-283-9
1-290-6
1-297-8
1-299-301
1-302-10
1-311
1-312
1-313
1-314
1-315
1-316
1-376
1-388
1-377
1-317
1-382
1-383
1-279
1-1 thru 1-33
1-34 thru 1-91
1-92 thru 1-238
1-239 thru 1-246
1-247 thru 1-272
1-273
1-274
1-275
1-276
1-277
1-321
1-322
1-385
1-318
1-379
1-414
1-415
1-416
1-417
1-418
1-419
1-420
1-421
1-422
1-423
1-424
1-425
1-426
1-427
1-428
1-429
1-430
1-431
1-649
1-870
1-871
1-872
1-873
1-874
1-875
1-876
1-877
1-878
1-879
1-880
1-881
1-882
1-883
1-884
1-885
1-886
1-887
1-888
1-889
1-890
1-891
1-892
1-893
1-894
1-895
1-896
1-897
1-898
1-899
1-900
1-901
1-902
1-903
1-904
1-905
1-906
1-323
1-324
1-325
1-326
1-327
1-328
1-329
1-330
1-331
1-332
1-333
1-334
1-335
1-336
1-337
1-338
1-339
1-340
1-341
1-342
1-343
1-344
1-345
1-346
1-347
1-348
1-349
1-350
1-351
1-352
1-353
1-354
1-355
1-356
1-357
1-358
1-359
1-360
1-361
1-362
1-363
1-364
1-365
1-366
1-367
1-368
1-369
1-370
1-371
1-372
1-373
1-374
1-375
1-380
1-278
1-280
1-281
1-319
1-320
1-378
1-381
1-384
1-386
1-387
1-389
1-390
1-391
1-392
1-393
1-394
1-395
1-396
1-397
1-398
1-399
1-400
1-401
1-402
1-403
1-404
1-405
1-406
1-407
1-408
1-409
1-410
1-411
1-412
1-413
1-432
1-433
1-434
1-435
1-436
1-437
1-438
1-439
1-440
1-441
1-442
1-443
1-444
1-445
1-446
1-447
1-448
1-449
1-450
1-451
1-452
1-453
1-454
1-455
1-456
1-457
1-458
1-459
1-460
1-461
1-462
1-463
1-464
1-465
1-466
1-467
1-468
1-469
1-484
1-485
1-486
1-487
1-488
1-489
1-490
1-491
1-492
1-493
1-494
1-495
1-496
1-470
1-471
1-472
1-473
1-474
1-475
1-476
1-477
1-478
1-479
1-480
1-481
1-482
1-483
1-498
1-499
1-501
1-502
1-503
1-504
1-507
1-508
1-509
1-510
1-511
1-512
1-513
1-514
1-515
1-516
1-517
1-520
1-521
1-523
1-524
1-525
1-526
1-527
1-532
1-533
1-534
1-535
1-536
1-537
1-538
1-539
1-540
1-541
1-542
1-543
1-544
1-545
1-546
1-547
1-548
1-549
1-550
1-551
1-552
1-553
1-554
1-555
1-556
1-557
1-558
1-559
1-562
1-563
1-564
1-565
1-566
1-567
1-568
1-569
1-570
1-571
1-572
1-573
1-574
1-575
1-576
1-577
1-578
1-579
1-580
1-581
1-582
1-583
1-584
1-585
1-586
1-588
1-589
1-590
1-594
1-592
1-593
1-594
1-595
1-596
1-597
1-598
1-599
1-600
1-601
1-602
1-603
1-604
1-605
1-606
1-607
1-608
1-609
1-610
1-611
1-616
1-617
1-618
1-620
1-621
1-623
1-624
1-625
1-626

[fol. 81]

1-627	1-679	1-742	1-805	1-868	1-1040	1-1103
1-628	1-680	1-743	1-806	1-869	1-1041	1-1104
1-629	1-681	1-744	1-807	1-979	1-1042	1-1105
1-630	1-682	1-745	1-808	1-980	1-1043	1-907
1-631	1-683	1-746	1-809	1-981	1-1044	1-908
1-632	1-684	1-747	1-810	1-982	1-1045	1-909
1-622	1-685	1-748	1-811	1-983	1-1046	1-910
1-633	1-686	1-749	1-812	1-984	1-1047	1-911
1-634	1-687	1-750	1-813	1-985	1-1048	1-912
1-635	1-688	1-751	1-814	1-986	1-1049	1-913
1-636	1-689	1-752	1-815	1-987	1-1050	1-915
1-637	1-690	1-753	1-816	1-988	1-1051	1-916
1-638	1-691	1-754	1-817	1-989	1-1052	1-917
1-639	1-692	1-755	1-818	1-990	1-1053	1-918
1-640	1-693	1-756	1-819	1-991	1-1054	1-919
1-641	1-694	1-757	1-820	1-992	1-1055	1-920
1-642	1-695	1-758	1-821	1-993	1-1056	1-921
1-643	1-696	1-759	1-822	1-994	1-1057	1-922
1-646	1-697	1-760	1-823	1-995	1-1058	1-923
1-647	1-698	1-761	1-824	1-996	1-1059	1-924
1-497	1-699	1-762	1-825	1-997	1-1060	1-925
1-500	1-700	1-763	1-826	1-998	1-1061	1-926
1-505	1-701	1-764	1-827	1-999	1-1062	1-927
1-506	1-702	1-765	1-828	1-1000	1-1063	1-928
1-529	1-703	1-766	1-829	1-1001	1-1064	1-929
1-530	1-704	1-767	1-830	1-1002	1-1065	1-930
1-531	1-705	1-768	1-831	1-1003	1-1066	1-931
1-560	1-706	1-769	1-832	1-1004	1-1067	1-932
1-561	1-707	1-770	1-833	1-1005	1-1068	1-933
1-587	1-708	1-771	1-834	1-1006	1-1069	1-934
1-615	1-709	1-772	1-835	1-1007	1-1070	1-935
1-644	1-710	1-773	1-836	1-1008	1-1071	1-936
1-645	1-711	1-774	1-837	1-1009	1-1072	1-937
1-648	1-712	1-775	1-838	1-1010	1-1073	1-938
1-650	1-713	1-776	1-839	1-1011	1-1074	1-939
1-651	1-714	1-777	1-840	1-1012	1-1075	1-940
1-652	1-715	1-778	1-841	1-1013	1-1076	1-941
1-653	1-716	1-779	1-842	1-1014	1-1077	1-942
1-654	1-717	1-780	1-843	1-1015	1-1078	1-943
1-655	1-718	1-781	1-844	1-1016	1-1079	1-944
1-656	1-719	1-782	1-845	1-1017	1-1080	1-973
1-657	1-720	1-783	1-846	1-1018	1-1081	1-974
1-658	1-721	1-784	1-847	1-1019	1-1082	1-914
1-659	1-722	1-785	1-848	1-1020	1-1083	1-975
1-660	1-723	1-786	1-849	1-1021	1-1084	1-976
1-661	1-724	1-787	1-850	1-1022	1-1085	1-977
1-662	1-725	1-788	1-851	1-1023	1-1086	1-978
1-663	1-726	1-789	1-852	1-1024	1-1087	1-959
1-664	1-727	1-790	1-853	1-1025	1-1088	1-969
1-665	1-728	1-791	1-854	1-1026	1-1089	1-945
1-666	1-729	1-792	1-855	1-1027	1-1090	1-946
1-667	1-730	1-793	1-856	1-1028	1-1091	1-947
1-668	1-731	1-794	1-857	1-1029	1-1092	1-948
1-669	1-732	1-795	1-858	1-1030	1-1093	1-949
1-670	1-733	1-796	1-859	1-1031	1-1094	1-950
1-671	1-734	1-797	1-860	1-1032	1-1095	1-951
1-672	1-735	1-798	1-861	1-1033	1-1096	1-952
1-673	1-736	1-799	1-862	1-1034	1-1097	1-953
1-674	1-737	1-800	1-863	1-1035	1-1098	1-954
1-675	1-738	1-801	1-864	1-1036	1-1099	1-955
1-676	1-739	1-802	1-865	1-1037	1-1100	1-956
1-677	1-740	1-803	1-866	1-1038	1-1101	1-957
1-678	1-741	1-804	1-867	1-1039	1-1102	1-958

[fols. 82-83] EXHIBIT "B" TO MOTION

DISTRICT OF COLUMBIA, SS:

Walker Smith, being first duly sworn, says:

The documents called for in the attached motion, as listed in the attached Exhibit "A", are relevant or material to the issues of this cause and are needed to aid the plaintiff in the preparation of its case, and particularly in support of the allegations contained in paragraph 34 of the Complaint.

Walker Smith, Trial Attorney, United States Department of Justice.

Subscribed and sworn to before me on this 5th day of March, 1953.

Sara B. McGrann, Notary Public.

My Commission expires May 1, 1956. (Seal)

[fols. 83a-87] [File endorsement omitted]

[fols. 88-112] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

Newark, N. J.
Wednesday, March 25, 1953.

Transcript of Hearing on Motion for Discovery and Production of Documents Under Rule 34

Before The Honorable Alfred E. Modarelli, U.S.D.J.

APPEARANCES:

Walker Smith, Trial Attorney, Department of Justice, Norman J. Futor, Trial Attorney, Department of Justice, attorneys for plaintiff.

Toner, Crowley, Woelper & Vanderbilt, attorneys for defendant Procter & Gamble, Marshall Crowley, of counsel, by Dinsmore, Shohl, Sawyer & Dinsmore (of Ohio Bar), Richard W. Barrett, of counsel, and Dwight, Royall, Harris, Koegel & Caskey (of New York Bar), Kenneth C. Royall and H. Allen Lochner, of counsel.

Cahill, Gordon, Zachry & Reindel, attorneys for defendant Colgate, by N. F. Correa (of New York Bar).

Bailey, Schenck & Bennett, attorneys for defendant Lever Brothers, by Arnold, Fortas & Porter (of District of Columbia Bar), Abe Fortas, of counsel.

McCarter, English & Studer, attorneys for defendant Assn. of American Soap and Glycerine Products, by Davies, Richberg, Tydings, Beebe & Landa (of District of Columbia Bar), J. T. Welch, of counsel.

[fol. 113] Mr. Royall:

* * * * * * *

[fol. 114] Finally, your Honor, we call attention to the fact that at the end of eighteen months the Grand Jury failed to render a true bill and immediately thereafter a representative of the Department of Justice stated that

while he would not say what happened before the Grand Jury, yet no one in the Justice Department was unhappy over the action of the Grand Jury.

The Court: Who said that, Brother Smith?

[fol. 115] Mr. Smith: Your Honor, the General asked me how I felt at the time the complaint was to be filed, said, "Can you say what has happened?" I said, "I can't say what has happened. I am not unhappy." But I didn't intend to cast great implications in any direction. Certainly it is improper for me at any time to say what happens. I was asked; I wouldn't and shan't, unless your Honor orders me to, reveal.

The Court: I guess nobody cares down there whether you were happy about the outcome or not.

Mr. Smith: I didn't know anybody was. I thought it was a fairly casual comment.

The Court: Well, did you really try to get an indictment?

Mr. Smith: Your Honor, if your Honor please, I——

The Court: I presented cases to Grand Juries for years when I was a prosecutor.

Mr. Smith: I know, sir.

The Court: There are two ways of presenting cases.

Mr. Smith: I don't like to reveal anything that transpires there, and that is a very considered view, not only of my own, sir, but of my superiors, that we must maintain that if your Honor does not——

The Court: I asked you a simple question, did you try to get an indictment. It calls for a simple answer, yes or no.

[fol. 116] Mr. Smith: Does your Honor think—does your Honor desire me to answer what happened within the Grand Jury?

The Court: No. You presented the evidence with a view to getting an indictment, is that right?

Mr. Smith: Your Honor, I presented the evidence and presented it in substantial detail. It seems to me that the ultimate fact as to what happened in the end result of the Grand Jury requires a revelation of what was said within the room and done within the room. I think your Honor doesn't want me to answer that.

The Court: No, I do not.

Mr. Smith: I stated clearly and I state again, your Honor, that I was instructed to and did carry on an investigation to determine had there been criminal violations. That is the primary determination that has to be made, whatever other action is taken, and I do not in any way admit that the sole object, as was indicated a couple of times in the papers for the defendant, was a civil case. I was starting to consider whether your Honor wanted me to go back into a discussion of the nature of the law.

The Court: No.

Mr. Smith: Does that answer your question?

The Court: It certainly does. I knew that is the way you would answer it. If you get a poor witness on the stand who doesn't answer yes or no right away, he is [fols. 117-144] badgered to death. But when I ask a lawyer, I get a long-winded answer all the time.

Mr. Smith: Does your Honor——

The Court: I don't want any more explanation. I know you can't reveal what went on. I asked you whether you tried to get an indictment. That is a simple question. It is either yes or no, because that will dispose of the General's contention that you only used the Grand Jury processes to get the necessary information to proceed civilly. He makes it quite clear that that is what he thinks. And I asked you a simple question whether you presented the evidence and tried to get an indictment.

Mr. Smith: Your Honor, the proceedings were initiated and——

The Court: If you can't answer yes or no, Mr. Smith, just say so.

Mr. Smith: I think I shouldn't, sir.

The Court: All right, sir, that is all. Thank you.

[fol. 145] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

—vs—

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, Lever Brothers Company and The Association of American Soap and Glycerine Producers, Inc., Defendants.

APPEARANCES:

Walker Smith and Norman J. Futor, Esqs., Attorneys for Plaintiff.

Toner, Crowley, Woelper & Vanderbilt, Esqs., by Marshall Crowley, Esq., Dinsmore, Shohl, Sawyer & Dinsmore, Esqs., (Ohio Bar), by Richard W. Barrett, Esq., Dwight, Royall, Harris, Koegel & Caskey, Esqs., (N.Y. Bar), by Kenneth C. Royall & H. Allen Lochner, Esqs., Attorneys for Defendant, The Procter & Gamble Company.

Cahill, Gordon, Zachry & Reindel, Esqs., (N.Y. Bar), by M. F. Correa, Esq., Attorneys for Defendant, Colgate-Palmolive-Peet Company.

Bailey, Schenck & Bennett, Esqs., Arnold, Fortas & Porter, Esqs., (District of Columbia Bar), by Abe Fortas, Esq., Attorneys for Defendant, Lever Brothers Company.

McCarter, English & Sfuder, Esqs., Davies, Richberg, Tydings, Beebe & Landa, (District of Columbia Bar), by J. T. Welch, Esq., Attorneys for Defendant, The Association of American Soap & Glycerine Producers, Inc.

MODARELLI, District Judge.

[fol. 146] OPINION—Filed May 11, 1953

The plaintiff, the United States of America, moves this court for an order requiring the defendant, Procter & Gamble Company to produce certain documents, a list of which is attached as Exhibit A to the moving papers, for inspection, copying, and photographing. It will be treated

like any other motion under Rule 34 of the Federal Rules of Civil Procedure.

Rule 34 provides:

> "Upon motion of any party showing good cause therefor * * * the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control * * * ."

Rule 26(b) generally provides: The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved, and it is not ground for objection that the testimony will not be admissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. How any judge can foretell the latter result with any certainty is beyond me.

The government is required to show good cause; that the material is not privileged; and constitutes or contains evidence relating to the subject matter in the pending litigation.

The purpose of this rule is to make relevant and non-privileged documents in the possession of one party available to the other. The rule is to be literally construed. Baron & Holtzoff, Vol. 2, pp. 484, 485.

[fol. 147] In a prior criminal proceeding against several defendants, one of whom was Procter & Gamble Company who here opposes the motion to produce, the government sought these same papers and documents through grand jury subpoenas. The defendant objected, and after lengthy argument by counsel and careful deliberation by the court, Judge Forman granted the government's demand for the documents.

Defendant's counsel, both in his brief and in his argument before the court, attacks the decision in the criminal proceeding. I must remind counsel that that proceeding

is not before this court. This court does not sit in review of the Chief Judge or any other judge of this district. The defendant was given ample opportunity to present his arguments before Judge Forman, whose decision indicates that the documents were necessary for the purposes of establishing the government's case.

Defendant argues that the plaintiff had possession of the documents here requested for a year and a half and has made copies and notes of them. Thus, defendant says "it would seem obvious that plaintiff is already in possession of the information sought and has no cause for production under Rule 34."

The obvious answer to this is found in defendant's "brief in opposition to plaintiff's motion for production by defendant, The Procter & Gamble Company, of documents pursuant to Rule 34 of the Rules of Civil Procedure," paragraph 29 of the affidavit of defendant's attorney, Kenneth C. Royall. He states, "* * * in this civil case in which for the first time in a definite adversary action an effort is made to use the Grand Jury documents, Procter contends that these documents were illegally obtained and cannot in this proceeding be used or ordered produced." From defendant's affidavit it would appear that the government was well advised to seek production of these document anew in this cause to avoid the objections voiced by defendant's attorney, rather than depend upon the previous [fol. 148] possession in the criminal action. Indeed, in the Application of Bendix Aviation Corporation, 58 F. Supp. 953 (S.D. N.Y. 1945), where a subpoena was served upon defendant to produce voluminous documents at an inquest of a grand jury regarding a violation of the anti-trust laws, the court directed the government to return the documents. The government was required to apply for an order impounding the documents before they could be used in the subsequent civil action.

The documents sought, about 800 in number, are identified by numbers placed upon them by defendant when it produced them pursuant to the grand jury subpoenas. The court has not seen these documents nor did the defendant ever submit them for the court's inspection. The government's attorney filed a statement under oath that the exhibits "* * * are relevant or material to the issues of

this cause and are needed to aid the plaintiff in the preparation of its case * * *." The fact that Judge Forman felt after extended hearings that the same documents were pertinent to the government's case in the criminal proceedings lends strong support to plaintiff's statement. Nothing which defendant's counsel has stated in his brief or his arguments before this court indicates otherwise.

Defendant argues that the government instituted criminal proceedings only as a means to the end of gaining information to be used in this civil proceedings; such use of subpoena power is illegal; and that, therefore, the documents sought cannot be used in a civil action brought by the government. No authority is cited by defendant in support of the proposition, and the court unable to find such authority does not take this to be the rule. Government's counsel stated in affidavit form that the purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them, or of any other Federal anti-trust laws, and, second, determination as to what action should be [fols. 149-150] taken to enforce those laws through criminal proceedings, civil proceedings or both. He further stated that the investigation and all proceedings incident to it, including the grand jury proceedings, were begun and carried on pursuant to and within instructions to accomplish those purposes. It is not for the court to criticize this procedure by a refusal to allow production of the documents requested.

The government's motion is granted.

An order may be submitted in conformity with the opinion herein expressed.

[fol. 150a] [File endorsement omitted]

[fol. 151] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER GRANTING MOTION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS—May 27, 1953

The plaintiff having moved this Court for an order pursuant to Rule 34 of the Rules of Civil Procedure requiring the defendant, The Procter & Gamble Company, to produce and permit the inspection and copying by photostating or other appropriate means by plaintiff of certain documents in the possession, custody or control of the defendant; and said motion having come on to be heard on March 25, 1953; and the Court having heard argument of counsel and being fully advised, and having rendered its opinion, which was filed with the Clerk of the Court May 11, 1953, and having determined that said documents are relevant for the purposes of Rule 34, it is

Ordered, that the motion of plaintiff be and it hereby is granted, and that the said defendant prepare for and deliver to plaintiff, as hereinafter provided, copies (by photostating or other appropriate means) of such documents listed in the plaintiff's motion herein as plaintiff shall from time to time designate to the defendant (but such designation shall in no event be later than such date as is set by the Court terminating exercise of general rights of discovery by the parties to this case); within two weeks after such designation or within such other time after such designation as may be agreed upon, defendant shall deliver to plaintiff at the United States Attorney's Office, Newark, New Jersey, or the Attorney General's [fol. 152] Office in Washington, D. C., as plaintiff may elect, so many photostatic copies of each such document as plaintiff shall designate (such photostats, unless otherwise agreed to, to be made by a reputable photostater in Cincinnati, Ohio as to minute books, in New York City as to other documents, such photostater to be designated by the plaintiff), the cost of such photostating to be borne by plaintiff; and it is further

Ordered, that plaintiff may inspect such originals of the said documents listed in plaintiff's motion herein as

plaintiff may from time to time designate; documents so designated shall be produced by defendant at the office of Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, or at the Office of Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio, at defendant's election, within ten days after receiving the request for such inspection (but such designation and inspection shall in no event be later than such date as is set by the Court terminating exercise of general rights of discovery by the parties to this case); and it is further

Ordered, that defendant may have its exception to this order and to any findings or conclusions in this order or in the opinion.

Dated May 27th, 1953.

Alfred E. Modarelli, United States District Court Judge.

[fol. 152a] [File endorsement omitted]

[fol. 153] In the United States District Court for the District of New Jersey

[Title omitted]

Motion for Return of Copies and Other Writings—Filed June 4, 1953

The defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter"), respectfully shows to the Court as follows:

As more fully appears in the affidavit and brief filed simultaneously herewith, plaintiff, illegally it is contended, made and transported to Washington, D. C. copies, notes, etc. of documents submitted by Procter pursuant to subpoenas duces tecum to a certain Grand Jury sitting in this District in 1951 and 1952, and discharged on November 25, 1952, and both legal and practical reasons exist for ordering their return. The documents, of which the copies,

notes, etc. were made, are the same as those which were the subject matter of an order entered by this Court in this case on May 27, 1953, on plaintiff's motion under Rule 34 of the Federal Rules of Civil Procedure.

[fol. 154] Procter therefore moves this Court for an order requiring plaintiff and its counsel to deliver to Procter all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning the documents which are the subject of the order of this Court on plaintiff's motion under Rule 34, entered on May 27, 1953.

Dated: June 4, 1953.

Toner, Crowley, Woelper & Vanderbilt, by Willard G. Woelper, 810 Broad Street, Newark, New Jersey. (S.) Richard W. Barrett. Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio. (S.) Kenneth C. Royall. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 155] In the United States District Court for the District of New Jersey

[Title omitted]

Notice of Hearing of Motion—Filed June 4, 1953

To: Grover C. Richman, Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Walker Smith, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Mathias F. Correa, Esq., Cahill, Gordon, Zachry & Reindel, 63 Wall Street, New York, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. James T. Welch, Esq., Davies, Richberg, Tydings, Beebe & Landa 1000 Vermont Avenue, N. W., Washington, D. C.

Sirs:

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court on the 22nd

[fol. 156] day of June, 1953, at 10:00 A. M. or at such other time as the Court may order.

Dated: June 4, 1953.

Yours, etc., Toner, Crowley, Woelper & Vanderbilt, By (S.) Willard G. Woelper, 810 Broad Street, Newark, New Jersey. (S.) Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio. (S.) Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for defendant, The Procter & Gamble Company.

[fol. 157] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

AFFIDAVIT—Filed June 4, 1953

STATE OF NEW YORK,
County of New York, ss:

KENNETH C. ROYALL, being duly sworn, deposes and says:

1. I am a member of the firm of Dwight, Royall, Harris, Koegel & Caskey, one of the attorneys for the defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter").

2. This affidavit is made on behalf of Procter in support of Procter's motion dated June 4, 1953, for an order requiring the plaintiff and its counsel to return to Procter all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning certain documents hereinafter referred to.

3. Procter had submitted these same documents, pursuant to subpoenas duces tecum as modified by order of Judge Forman of this Court, to a certain Grand Jury sitting in this District in 1951 and 1952. Such order of Judge Forman was not appealable or reviewable by Procter.

[fol. 158] 4. The Grand Jury was discharged on November 25, 1952, without returning any indictment against Procter

or any other person or corporation in this antitrust matter. After considerable delay the plaintiff finally returned all these documents to Procter on March 10, 1953.

5. On May 27, 1953, pursuant to a motion made by the plaintiff herein under Rule 34 and opposed by Procter, this Court ordered Procter to deliver to the plaintiff copies of such of these documents as the plaintiff shall designate. Procter has no present right of appeal from or review of this order of May 27 and at this stage of this action is bound thereby.

6. As is fully set forth in my prior affidavit of March 17, 1953, submitted in opposition to plaintiff's motion under Rule 34 (which affidavit is hereby incorporated and made a part hereof), Judge Forman, during the hearings on the motions to quash the said subpoenas duces tecum, ruled that the documents to be submitted should be retained in rooms provided in the Federal Building, Newark, New Jersey, and counsel for the Government acquiesced. Nevertheless, in violation of this ruling, as we contend, counsel for the Government caused copies and notes, etc. of certain of the said documents to be made and to be taken to Washington, D. C., where they would normally have been handled or seen by persons not directly concerned with the Grand Jury proceedings.

7. It is alleged that the plaintiff has no right to retain these copies and other writings. Procter has on several occasions—two since the filing of the instant complaint and once since the order of May 27, 1953—demanded return of all such copies, notes, excerpts, analyses, summaries and [fol. 159-162] other writings concerning the said documents. However, plaintiff has absolutely refused to return any of these copies and other writings.

8. In addition to enforcing Procter's legal right to such copies, notes, excerpts, analyses, summaries and other writings, a practical purpose will also be served in that the possession of these writings by Procter would obviate in many instances the necessity of photostating particular documents under this Court's order of May 27, 1953, and would eliminate the time and trouble thereby required, since the returned copies, after being noted, could be delivered to plaintiff in lieu of additional photostats.

9. Granting of this motion would also give Procter information to which it is entitled and would tend to expedite

the disposition of this case by indicating to Procter which of the said documents covered by the order of May 27, 1953 are and have been deemed by plaintiff to be so pertinent to plaintiff's contentions herein as to justify plaintiff's copying, noting, analyzing or summarizing. In this connection, Procter has as yet had no indication from plaintiff of any specific documents, from the large mass produced, which are deemed by plaintiff either to be relevant in this proceeding or to be those upon which plaintiff intends to rely in this proceeding.

10. No previous application for the same relief or for relief similar to that sought herein has been made. Procter opposed plaintiff's motion under Rule 34, partly on grounds similar to some of those set forth herein, but different issues were involved in that motion.

(S.) Kenneth C. Royall.

Sworn to before me this 4th day of June, 1953.
Rose C. Guarraia, Notary Public. (Seal.)

[fol. 162a] Acknowledgment of Service. (Omitted in printing.)

[File endorsement omitted.]

[fol. 163] In the United States District Court for the District of New Jersey

[Title omitted]

Motion to Suppress Certain Documents—Filed June 4, 1953

The defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter"), respectfully shows to the Court as follows:

On grounds similar to those urged by Procter in its brief and affidavit opposing plaintiff's motion under Rule 34 of

the Federal Rules of Civil Procedure, and as set forth in the affidavit and brief filed simultaneously herewith, Procter moves this Court for an order forbidding plaintiff from using against Procter in this case for any purpose prior to or during trial

(1) all documents submitted by Procter to the Grand Jury sitting in this District in 1951 and 1952 and listed in plaintiff's said motion dated March 6, 1953,

[fol. 164] (2) all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning any of the documents referred to in (1) above, and

(3) all papers, documents, and other like evidence obtained, directly or indirectly, by reason of information or knowledge derived wholly or partially from the papers mentioned in (1) and (2) above.

For like reasons and for the further reason that the other defendants in this action are jointly charged by plaintiff with jointly combining and conspiring with Procter in violation of the antitrust laws, Procter submits that plaintiff should not be entitled to use against Procter documents obtained from the other defendants during the Grand Jury proceedings and therefore moves this Court for an order forbidding plaintiff from using against Procter in this case for any purpose, prior to or during trial

(1) all documents submitted by the defendants other than Procter to the said Grand Jury, or to plaintiff pursuant to subpoenas duces tecum,

(2) all copies of all excerpts from, and all notes, analyses, summaries and other writings concerning any of the documents referred to in (1) above, and

(3) all papers, documents and other like evidence obtained, directly or indirectly, by reason of information or knowledge derived wholly or partially from the papers [fol. 165] mentioned in (1) and (2) above.

Procter contends that papers obtained by plaintiff from all persons, firms, corporations and other entities, other than the defendants in this case, should for like reasons be suppressed in so far as any use is attempted to be made of them against Procter and because they were obtained by what amounted to a pre-trial discovery proceeding of which Procter had no notice and no opportunity to appear. Procter

therefore moves this Court for an order forbidding plaintiff from using against Procter in this case for any purpose, prior to or during trial

(1) all documents submitted by any person, firm, corporation or other entity, other than the defendants, to the said Grand Jury or to plaintiff, pursuant to subpoenas duces tecum,

(2) all copies of, all excerpts from and all notes, analyses, summaries and other writings concerning any of the documents referred to in (1) above, and

(3) all papers, documents and other like evidence obtained, directly or indirectly, by reason of information or knowledge derived wholly or partially from the papers mentioned in (1) and (2) above.

Dated: June 4, 1953.

Toner, Crowley, Woelper & Vanderbilt, By (S.) Willard G. Woelper, 810 Broad Street, Newark, New [fol. 166] Jersey. (S.) Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio. (S.) Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York. Attorneys for Defendant, The Procter & Gamble Company.

[fol. 167] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF HEARING OF MOTION—Filed June 4, 1953

To: Grover C. Richman, Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Walker Smith, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Mathias F. Correa, Esq., Cahill Gordon, Zachry & Reindel, 63 Wall Street, New York, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. James T.

Welch, Esq., Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue N. W., Washington, D. C.

SIRS:

Please Take Notice that the undersigned will bring the [fol. 168] above motion on for hearing before this Court on the 22nd day of June, 1953, at 10:00 A. M. or at such other time as the Court may order.

Dated: June 4, 1953.

Yours, etc., Toner, Crowley, Woelper & Vanderbilt, By Willard G. Woelper, 810 Broad Street, Newark, New Jersey. Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York. Attorneys for defendant, The Procter & Gamble Company.

[fol. 169] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

AFFIDAVIT—Filed June 4, 1953

STATE OF NEW YORK,
County of New York, ss:

KENNETH C. ROYALL, being duly sworn, deposes and says:

1. I am a member of the firm of Dwight, Royall, Harris, Koegel & Caskey, one of the attorneys for the defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter").

2. This affidavit is made on behalf of Procter in support of Procter's motion, dated June 4, 1953, for an order forbidding plaintiff from using in this case against Procter for any purpose, prior to or during trial, the documents and papers described in the said motion.

3. As is more fully set forth in my affidavit of March 17, 1953, submitted in opposition to plaintiff's motion in this

cause under Rule 34 of the Federal Rules of Civil Procedure, which affidavit is incorporated by reference herein and made a part hereof.

[fol. 170] (a) Procter, as well as the other defendants herein and various other persons, firms and corporations, were served with subpoenas duces tecum commanding production of various categories of documents before a Grand Jury which sat in Newark, New Jersey, in 1951 and 1952.

(b) The said subpoenas, even as modified by order of Judge Forman of this Court, were so broad, sweeping, vague and indefinite as to be unreasonable, unduly burdensome and oppressive and thus to constitute an abuse of process and an illegal search and seizure. The documents submitted pursuant to said subpoenas were therefore illegally obtained and cannot be used for any purpose against Procter in this proceeding.

(c) The Government utilized the Grand Jury proceeding for the purpose of preparing for this civil action and in order to evade the protective requirements of the rules governing discovery in civil actions. The circumstances establishing such an abuse of process are fully set forth in my prior affidavit of March 17, 1953.

(d) The orders and instructions of Judge Forman, made during the hearings on the motions to quash the Grand Jury subpoenas were not complied with by the Government in many respects, including

(i) the failure of the Government to return the documents promptly to Procter and, instead, the retention of them until March 10, 1953, over three months after the Grand Jury was discharged on November 25, 1952, and approximately three months after the civil complaint was filed, and

(ii) the making of copies, notes, etc. of many of said documents and the taking of such copies, notes, etc. to [fols. 171-174] Washington, D. C., despite the rulings of Judge Forman that the documents should be kept in certain rooms in the Federal Building in Newark, New Jersey.

4. The documents submitted by Procter pursuant to the said subpoenas duces tecum are the same as those which are the subject of this Court's order of May 27, 1953, on plaintiff's motion under Rule 34. Procter has been granted an exception to the said order and will at the proper time take such exception.

5. By reason of the abuses of process described in my prior affidavit and summarized herein, I submit that the documents obtained in the said Grand Jury proceeding should be suppressed and that plaintiff should be forbidden to use against Procter in this case for any purpose prior to or during trial the documents described in this motion.

6. No previous application for the same relief or for relief similar to that sought herein has been made. Procter opposed plaintiff's motion under Rule 34 partly on grounds similar to those set forth herein but the issue on that motion and the relief sought by the plaintiff were different from the issue herein and relief here sought by Procter, and such issue could not properly be raised and such relief could not properly be sought on a motion under Rule 34.

(S.) Kenneth C. Royall.

Sworn to before me this 4th day of June, 1953.
Rose C. Guarraia, Notary Public. (Seal.)

[fols. 174a-192] Acknowledgment of Service. (Omitted in printing.)

[File endorsement omitted.]

[fol. 193] In the United States District Court for the District of New Jersey

[Title omitted]

Stipulation for Inspection and Copying By Defendants of Certain Third Person Documents—Filed July 15, 1953

Whereas the defendants in the above-styled case have sought permission to inspect and copy certain documents or copies of documents which are in the possession of the attorneys for the plaintiff for use in preparation for trial

and which were obtained from and are records of persons, firms or corporations who are not parties to the above-styled case (sometimes hereinafter referred to as "third persons"); and

Whereas the third persons whose names appear in Exhibit A attached hereto have stated that they have no objection to the inspection and copying by or on behalf of the said defendants of the documents or copies of documents now in possession of the attorneys for the plaintiff which were obtained from said third persons whose names appear in Exhibit A;

It is hereby stipulated and agreed, subject to the approval of the Court, by and between the attorneys for The Procter & Gamble Company, Colgate-Palmolive-Peet Company, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., defendants, and [fol. 194] each of them, on the one part, and the attorneys for the United States, plaintiff, on the other, that

The defendants, or any of them, may inspect the said documents or copies of documents of the said third persons whose names appear in Exhibit A, at the Department of Justice Building in Washington, District of Columbia, or at the United States Court House in Newark, New Jersey (whichever attorneys for plaintiff in each instance specify), at a time or times to be agreed upon between attorneys for the parties, and each defendant may obtain such photostats of said documents (whether originals or copies) as it may from time to time designate in writing to the attorneys for the plaintiff, such copies to be prepared by a photostater or photostaters to be agreed upon by the attorneys for the parties and to be furnished to such defendant at the defendant's expense, within a reasonable time after receipt by the attorneys for plaintiff of each written designation; and that

The inspection and copying of such documents of said third persons provided for herein shall be without prejudice to the right of any party to seek and obtain further discovery pursuant to the Federal Rules of Civil Procedure, and without prejudice to the positions of either the plaintiff or the defendants as to the propriety of the plaintiff having such documents or copies thereof in its possession or as to

[fol. 195] the admissibility of either the documents or copies thereof as evidence in this case.

Dated: ——, ——.

Walker Smith, Trial Atty., Attorney for Plaintiff.
Kenneth C. Royall, For the Procter & Gamble Co.
James B. Henry, Jr., For Colgate-Palmolive-Peet Co.
Abe Fortas, For Lever Brothers Company.
Augustus C. Studer, Jr., For The Association of American Soap and Glycerine Producers Inc.
(Copy illegible.)

Approved this 15th day of July, 1953.

Alfred E. Modarelli, United States District Court Judge.

[fols. 196-197] EXHIBIT A TO STIPULATION FOR INSPECTION AND COPYING BY DEFENDANTS OF CERTAIN THIRD PERSON DOCUMENTS OF

American Hyalsol Corporation.
Butchers' Advocate Publishing Co., Inc.
E. I. duPont de Nemours & Company.
Economics Laboratory, Inc.
Economy Grocery Stores Corp. (now "Stop & Shop, Inc.")
Andrew P. Federline.
First National Stores.
E. F. Forbes (Western Meat Packers Association).
E. H. Frey Company, Inc.
General Dyestuff Corporation.
The Glidden Company.
Herrgott & Wilson.
Hockwald Chemical Company.
E. F. Houghton & Company.
E. G. James Company.
H. Kohnstamm & Co., Inc.
Kullman & Co.
Laurel Soap Manufacturing Co., Inc.
Los Angeles Soap Company.
M. Michel and Company, Inc.
Newell Gutradt Company.
North Coast Chemical & Soap Works, Inc.

Nu Bora Soap Company.
Pioneer Soap Company, Inc.
Rohm & Haas Company.
Joseph Rosenberg's Sons, Inc.
The Sharples Corporation and Sharples Chemicals, Inc.
L. Sonneborn Sons, Inc.
Spiegel and Peiffer.
The Theobald Industries.
Tidy House Products Company.
M. Werk Company.
Wilbur-Ellis Company.
Willitts and Company.
Wilson Brokerage.
F. B. Wise (National Renderers Association).
Allen B. Wrisley Company.

[fol. 197a] [File enforsement omitted]

[fol. 198] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, Lever Brothers Company and The Association of American Soap and Glycerine Producers, Inc., defendants.

OPINION—Filed January 14, 1954.

MONDARELLI, District Judge.

This is a suit under Section 4 of the Sherman Anti-Trust Act (15 U.S.C.A. § 4), which Act has been called "A Charter of Freedom" by Chief Justice Hughes who wrote the unanimous opinion in *Appalachian Coals, Inc.* v. *U. S.*, 288 U.S.

344, 360, which charter was required because of the nationalization of business in the United States. The defendant Procter & Gamble Company (hereinafter called Procter) has filed two motions; the first one entitled "Motion for return of copies and other writings"; and the second one "Motion to suppress certain documents." The motions were submitted upon briefs and affidavits of Procter and the plaintiff, oral argument having been waived by counsel for both parties.

The defendant does not move under any rules of the Federal Rules of Civil Procedure, nor does it cite any persuasive authority for these unique motions. The identical documents covered by these motions are the same as those which were submitted by Procter, pursuant to a subpoena duces tecum, to a grand jury sitting in this District in 1951 and 1952, and again the subject matter of an order entered by this court in this case on May 27, 1953, on plaintiff's motion under Rule 34 of the Federal Rules of Civil Proce- [fol. 199] dure. *United States* v. *Procter & Gamble Co., et al.*, 14 F.R.D. 230. The movant seeks to eliminate from the case the documents which *twice* have been ordered produced by two District Court Judges.

Movant argues that an "abuse of process" by the Department of Justice has so tainted the documents that the "only effective remedy for such abuse is to prohibit use by plaintiff against Procter for any purpose in this case of any of the documents and papers referred to in the motion." But what was the abuse of process? The process used by plaintiff was a subpoena duces tecum, which is properly used when the Department of Justice, charged by law with the duty of enforcing the antitrust laws, invokes it for the purpose of obtaining documents to be presented to a grand jury investigating possible violations of the law. The Department never saw any of the documents until Procter complied with a subpoena duces tecum issued at the outset of the criminal investigation; and the documents upon which the motions are based are the same documents that will be used by the plaintiff in the current civil action if the motions are denied. But even assuming *arguendo* that it is wrongful to issue a subpoena duces tecum solely for the purpose of obtaining evidence for use in a subsequent civil suit, Procter has not cited any authority in

support therefor. The Fourth and Fifth Amendments to the Constitution are not pertinent to the motions herein.

In essence, Procter's argument is that evidence obtained by wrongful conduct should be excluded from a case. Assuming that such a general proposition is the law, in what way was plaintiff's conduct wrongful? Defendant asserts that the subpoena duces tecum was issued in bad faith in that plaintiff never really sought an indictment, but, that lacking the subpoena power, it used the criminal investigation as a pretense for obtaining documents upon which to base a civil case. The assertion has not been substantiated and is referred to in this opinion not because [fols. 200-201] proof thereof would persuade the court to order the documents suppressed as evidence. Recently, however, a large segment of the Bar has complained that the Department of Justice has misused the grand jury in order to subpoena documents under color of criminal investigation, not looking toward an indictment, but seeking information upon which to base a civil action. If such conduct could be proved, the proper remedy is not the granting of this type of motion, which would probably result in an insurmountable obstacle to any civil action, but by a direct attack at the outset of the criminal investigation. Indirect deterrence does not outweigh enforcement of the antitrust laws. If the court were to grant these motions, would it not, in effect, forever bar a civil action? And would not the principle of law be that where documents are produced by a party pursuant to a subpoena duces tecum for consideration by a grand jury and thereafter the documents returned, no indictment having been found, as was the case here, and subsequently a civil action is commenced by the United States against the same party and the same documents are produced pursuant to Rule 34, that nevertheless the United States must deliver to that party its "work product" based on the documents and all evidence therefrom must be suppressed. There is no authority or precedent for such proposition, nor does this court believe that should be the law.

Motions denied.

[fol. 201a] [File endorsement omitted]

[fol. 202] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER DENYING MOTION TO SUPPRESS CERTAIN DOCUMENTS—January 14, 1954

The defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter"), having moved this Court for an order forbidding plaintiff, United States of America, from using against Procter in this case for any purpose prior to or during trial (1) all documents submitted by Procter to the Grand Jury sitting in this District in 1951 and 1952 and listed in plaintiff's Motion under Rule 34 which was granted May 27, 1953, and all documents submitted by the defendants other than Procter, and by any other person, firm, corporation or other entity to said Grand Jury or to plaintiff pursuant to subpoenas duces tecum; (2) all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning any of the documents referred to in (1) above; and (3) all papers, documents and other like evidence obtained, directly or indirectly, by reason of information or knowledge derived wholly or partially from the papers mentioned in (1) and (2) above; and the Court having considered the matter upon the briefs and affidavits of Procter and the plaintiff, oral argument having been waived by counsel for both parties, it is ordered, [fols. 203-204] that the motion of Procter be and it hereby is denied.

Dated: Jan. 14, 1954.

Alfred E. Modarelli, United States District Court Judge.

Agreed as to form, Kenneth C. Royall, counsel for defendant, The Procter & Gamble Company.

[fol. 204a] [File endorsement omitted]

[fols. 205-206] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER DENYING MOTION FOR RETURN OF DOCUMENTS—January 14, 1954

The defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter"), having moved this Court for an order requiring plaintiff, United States of America, and its counsel to deliver to Procter all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning the documents which are the subject of the order of this Court on plaintiff's motion under Rule 34, entered on May 27, 1953; and the Court having considered the matter upon the briefs and affidavits of Procter and the plaintiff, oral argument having been waived by counsel for both parties, it is ordered, that the motion of Procter be and it hereby is denied.

Dated: January 14th, 1954.

Alfred E. Modorelli, United States District Court Judge.

Agreed as to form: Kenneth C. Royall, counsel for defendant, The Procter & Gamble Company.

[fol. 206a] [File endorsement omitted]

[fol. 207] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION

To: Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York, New York. O'Mara, Schumann, Davis & Lynch, 1 Exchange Place, Jersey City, New Jersey.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 13th day of September, 1954, at 10:00 A.M., or at such other time thereafter as may be set at the convenience of the Court on notice to you.

Dated: August 20, 1954.

(S.) Joseph E. McDowell. (S.) Robert Brown, Jr. (S.) Charles L. Kent. (S.) Daniel H. Margolis, Trial Attorneys.

Certificate of Service (omitted in printing)

[fol. 208] In United States District Court for the District of New Jersey

[Title omitted]

Motion for Discovery and Production of Documents Under Rule 34—Filed August 23, 1954.

The plaintiff moves the Court for an order requiring defendant Colgate-Palmolive-Peet Company to produce and permit the plaintiff to inspect and copy, by photostating or other appropriate means, the hereinafter described documents. These documents constitute or contain evidence relevant or material to the issues involved in this action, as is more fully shown in the affidavit attached hereto. This defendant has possession, custody or control of these documents.

1. Profit and loss statements and balance sheets for the years 1952 and 1953 for each of the Company's manufacturing and sales departments or divisions thereof engaged in the manufacture or sale of soap or synthetic detergents.

2. Records or work books for the period January 1, 1946 to June 30, 1954, showing monthly estimates of departmental expenses and profits and losses for the departments,

divisions and sub-divisions of the Company engaged in the production or sale of soap or synthetic detergents.

[fol. 209] 3. All published price lists for soap, synthetic detergents and glycerine issued by the Company for the period from January 1, 1952 through June 30, 1954.

4. Entries from July 14, 1951 through June 30, 1954 confirming the records produced pursuant to prior order showing prices at which household soaps and household synthetic detergents were offered for sale by the Company during such period.

5. Records or work books showing for each plant of the Company

a) estimates of costs
b) unit costs
c) unit cost comparisons
d) unit cost of each ingredient
e) unit quantity of each ingredient
f) statements of estimated unit costs
g) finished product cost records
h) factory costs
i) delivered costs
j) total unit costs to make and sell, exclusive of delivery expense
k) estimated profits
l) net profits

which were prepared by or for the Company for the periods January 1, 1946, through June 30, 1954 for each package unit and form, including bars, beads, chips, flakes, granules, powders, and liquids of the following brands: Arctic Crystal, Badger, Bright Sail, Cashmere Bouquet, Crystal White, Fab, Formula #40, Octagon, Palmolive, Pearl, Peet's, Supersuds, Vel, Kirkman's and White Sail.

6. All market surveys, charts, tables and schedules, together with memoranda and correspondence relating thereto, prepared during or covering the period January 1, 1946 to December 31, 1946, and from January 1, 1950 to June 30, 1954, which show for any area or areas for any household soap, household synthetic detergent, detergent

base material, tallow, grease, glycerine, or any combinations thereof:

A) as to any other company or companies:

1) production
2) sales
3) purchases
4) promotional expenditures
5) inventories
6) prices
7) costs
8) profits

[fol 210] B. as to any company or companies: the proportion of participation as to

1) production
2) sales
3) purchases
4) promotional expenditures
5) inventories.

7. All licenses, sublicenses, or other contracts or agreements concerning patents or patent applications, relating to spray-dried soap, spray-dried synthetic detergents, phosphate builders for soap or synthetic detergent, and synthetic detergent base compounds including alkylated hydrocarbons, aliphatic hydrocarbons, higher fatty alcohols and derivatives of such compounds, to which the Company was a party during the period from January 1, 1951 through June 30, 1954.

8. All memoranda or correspondence relating to the matters specified in the following sub-paragraphs, prepared, sent or received during or covering, the periods indicated in each such sub-paragraph:

A) during the period November 1, 1949 through June 30, 1954, concerning Civil Action No. 2429, Colgate-Palmolive-Peet Co. v. The Procter & Gamble Co., U. S. District Court, Southern District of Ohio, on Pat. Nos. 2,486,921 and 2,486,922.

B) during the period January 1, 1951 through June 30, 1954 concerning any patent or patent application included in the subject matter of the following agree-

ments and all amendments thereto relating to spray-dried soap or detergents:

Agreement	Date
Procter & Gamble Co. and Colgate-Palmolive-Peet Co. (Domestic Patents)	3/21/29
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and D. R. Lamont	10/16/30
Procter & Gamble Co., Colgate-Palmolive-Peet Co. and Lever Bros. Co. (Release to Procter and Colgate)	12/22/37
[fol. 211] Lever Bros Co., Colgate-Palmolive-Peet Co. and Procter & Gamble Co. (License to Procter and Colgate)	12/22/37
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and Lever Bros. Co. (Release to Lever)	12/22/37
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and Lever Bros. Co. (License to Lever)	12/22/37
Colgate-Palmolive-Peet Co., Lever Bros. Co. and Procter & Gamble Co. (Memorandum of Settlement Agrt.)	12/28/37
Colgate-Palmolive-Peet Co., and Procter & Gamble Co. (Amdt. of Par. 3 of Agrt. dated 3/21/29)	10/24/49

and referring to:

1) procuring or obtaining licenses or sublicenses under patents or patent applications
2) the terms or provisions, actual or proposed, of licenses or sublicenses issued or proposed to be issued under patents or patent applications
3) instructions or other information furnished to licensees or sublicensees under patents or patent applications
4) the granting or issuing of licenses or sublicenses under patents or patent applications
5) refusals to grant, or cancellations of, licenses or sublicenses under patents or patent applications

6) the payment of, or exemptions from the payment of, royalties or other compensation of licenses or sublicenses under patents or patent applications

7) the validity or invalidity of any patent application

8) patent interference proceedings and infringement litigation; settlement of, negotiations for settlement of, and threats to institute such litigation or proceedings.

9) conditions or restrictions upon the use of patents or upon the use by licensees or sublicensees of patented products, materials, or devices, or upon the manufacture, sale or use by licensees or sublicensees of products, materials, or devices manufactured under patented processes or methods

[fol. 212] 10) prices charged or to be charged by licensees or sub-licensees under patents for products, materials, or devices.

C) negotiations during the period January 1, 1949 to June 30, 1954 for the procurement of synthetic detergent petroleum base materials.

D) negotiations during the period January 1, 1946 to June 30, 1954 for the procurement of:

1) tetrasodium pyrophosphate and sodium tripolyphosphate

2) finished synthetic detergents.

E) construction by the supplier during the period January 1, 1946 to June 30, 1954 of production or processing facilities for synthetic detergent base materials or phosphates.

F) negotiations during the period January 1, 1946 to June 30, 1954 for processing for the Company of synthetic detergent base materials obtained from third parties.

9. With respect to the production of synthetic detergents, and plans therefor, all production schedules and estimates, analyses and estimates of base material requirements, and sales estimates, plans and projections for the period from January 1, 1946 through December 31, 1948, together with

all memoranda and correspondence relating thereto and prepared, sent or received during, or covering such period.

10. All contracts, agreements, and amendments thereto between the Company and any seller of synthetic detergent petroleum base materials, including but not limited to sulfonated and unsulfonated alkylated hydrocarbons, by which the Company agreed to purchase:

a) the seller's output of any type or types of synthetic detergent base
b) stated percentages of the seller's output of any type or types of synthetic detergent base
c) amounts of synthetic detergent base to be delivered over a period of time

[fol. 213] and which were in effect at any time during the period January 1, 1949 through June 30, 1954.

11. With respect to all price changes on household soap and household synthetic detergents, effectuated during the period from January 1, 1946 to June 30, 1954, all memoranda and correspondence prepared, sent or received during, or covering, such period, recommending, approving or authorizing such changes, or setting forth or relating to:

a) prices of other manufacturers
b) raw material prices, factory costs, promotional and advertising expenditures, other sales and administrative expenses, total costs
c) effects on profits
d) terms or conditions of sale
e) composition of products
f) package weights.

12. All market surveys, tabulations, memoranda, and correspondence prepared, sent or received during, or covering, the period from January 1, 1950 to June 30, 1954 showing or relating to shelf prices charged by retailers for household soap and household synthetic detergents.

13. Records showing each purchase of tallow or grease made by the Company for the following months:

a) November, 1946
b) March and November, 1947

c) January, 1948
d) September and November, 1950
e) January, 1951
f) December, 1953

and as to each such purchase the date, weight, grade, price per pound, f.o.b. point, delivery point, terms and conditions of sale, name and address of the seller, name of the broker (if any), and amount of any commission paid by the Company and the name and address of the recipient thereof.

[fol. 214] 14. All contracts or agreements, and amendments thereto between the Company and any seller of tallow or grease which were in effect at any time during the years 1951 through 1953, inclusive, and which called for delivery to the Company for a period of three months or more of:

a) the total amount of any grade or grades of the seller's tallow or grease
b) stated amounts of any grade or grades of the seller's tallow or grease.

15. All memoranda instructions, or correspondence prepared, sent or received during, or covering the periods from January 1, 1939 through December 31, 1941, and from January 1, 1947 through June 30, 1954, concerning purchases of tallow or grease and referring to prices, withholding or disclosure of prices, supplies, purchases by other buyers, timing of purchases, any bonus or system of paying bonuses to suppliers for better quality tallow or grease, and/or market studies and analyses.

16. All memoranda and correspondence prepared, sent or received during, or covering, the years 1947 through 1951 inclusive and referring

a) to the termination or the proposed termination of the "official New York market price" for tallow or grease; and,
b) to the criteria to be employed in determining the price of tallow or grease.

17. A) The tri-party Agreement establishing brand quotas or other limitations on the advertising and promotional expenses of each of the participants, which was

entered into by the Company, Procter & Gamble, and Lever Brothers in or about January, 1938.

B) All reports, memoranda and correspondence relating to the negotiations which were commenced on or about January 12, 1938 between representatives of the Company, and Procter & Gamble and/or Lever Brothers which resulted in the tri-party Agreement described in sub-paragraph A) *supra*.

[fol. 215] C) All memoranda and correspondence relating to the tri-party Agreement of 1938 described in sub-paragraph A) *supra*, or to meetings of representatives of the Company, Procter & Gamble and/or Lever Brothers, regarding details of this Agreement.

19. A) Records showing Sales Promotion and Free Goods Deals, Summary of Advertising, Sales Promotion and Free Goods Deals, and Departmental Advertising expenditures in each sales division and sales district by months from January 1, 1952 through June 30, 1954 for each of the Company's brands of household soap and household synthetic detergent products.

B) Records showing expenditures in each sales division, district and city for each type of brand sales promotion for which total expenditures are recorded in the records referred to in sub-paragraph A) *supra*, by months, from January 1, 1935 to December 31, 1941, and from January 1, 1946 to June 30, 1954, for each of the Company's household soap and household synthetic detergent products.

19. All memoranda and correspondence prepared, sent or received during, or covering, the periods from January 1, 1937 to December 31, 1942, and from January 1, 1946 to June 30, 1954, relating to the discontinuance or limitation, or the proposed discontinuance or limitation, by the Company, Procter & Gamble, Lever Brothers, and/or any other manufacturer, of one-cent sales, other special sales, special factory packs, premiums, or special advertising allowances (including count and recount sales plans) in any city, state, or region of, or throughout, the United States.

20. All competitive activity reports of the Company showing the cities, towns, and other larger and smaller territories in which other manufacturers couponed, offered con-

[fol. 216] sumer deals, or engaged in other promotional activities, for the years 1935 through 1939 inclusive and 1946 through June 30, 1954 inclusive.

21. Records showing for each sales district, and for each sales unit or lesser sales area for which such records are kept

a) number of coupons of each type
b) number of special packs of each type

distributed for each of the Company's brands of household soap and household synthetic detergents during each year, quarter, and month or other period for which such records were compiled from January 1, 1946 to June 30, 1954.

22. All market surveys, tabulations, charts, memoranda, and correspondence relating to the planning, objectives, conduct or results of each of the following promotional campaigns, without limitation to documents relating only to the Districts or regions specified, if such Districts or regions constituted only part of the area in which the promotional campaign was being conducted:

1) Concentrated Super Suds and Palmolive mail couponing campaign which was commenced in or about February, 1939.
2) Concentrated Super Suds and Palmolive house-to-house couponing campaigns which were being conducted in or about February, 1939 in Summit, New Jersey, Little Rock, Houston, Shreveport, Savannah, and Jacksonville.
3) Concentrated Super Suds and Palmolive special factory promotion pack which was being conducted in or about March, 1939 in Buffalo and in sections of New York City.
4) Palmolive free goods consumer deal campaigns (one cake of Palmolive offered free with purchase of Concentrated Super Suds) which were being conducted in June, 1939 in Jonesboro, Arkansas, Eldorado, Arkansas, Alexandria, Louisiana, and New Orleans.
5) Concentrated Super Suds "Cannon household cloth" premium promotions which were being con-

ducted in June, 1939 in Philadelphia and Wilkes Barre, Pensylvania.

6) Concentrated Super Suds flower-seed premium promotions which were being conducted in or about February, 1939 in Elizabeth, New Jersey, Pittsburgh, Bethlehem and Easton, Pennsylvania.

[fol. 217] 7) Palmolive, Super Suds, Cashmere Bouquet and Ajax multi-brand couponing campaign which was commenced in or about September, 1947.

8) Kirkman Flakes couponing campaigns which were being conducted in or about August, 1947 in the Boston and Philadelphia districts and regions.

9) Vel one-cent sale promotions which were being conducted:

a) in or about January, 1939 in Dayton, Ohio; and

b) in or about February, 1939 in Lima, Ohio.

10) Vel silk hosiery premium promotions which were being conducted in or about May, 1939 in South Bend, Indiana and Peoria, Illinois.

11) Vel half-price sale promotion which was being conducted between the Allegheny Mountains and the Pacific Coast in or about May, 1947.

12) Vel couponing campaigns which were being conducted:

a) in or about May, 1947 in Plainfield and Milburn, New Jersey, and Youngstown, Ohio; and

b) in or about June, 1947 in Flint, Michigan.

23. A) Records (or copies of reports) showing sales of soap and synthetic detergents by product categories as reported to the Association of American Soap and Glycerine Producers, Inc. for the period from January 1, 1952 through June 30, 1954.

B). Records (or copies of reports) showing sales and shipments of soap and synthetic detergents by product categories as submitted to the Bureau of Census of the

United States Department of Commerce for the period January 1, 1952 through June 30, 1954.

C) Records showing the Company's sales in dollars and by weight of soap and synthetic detergents by brands during each quarter from January 1, 1952 through June 30, 1954.

D) Records which show in dollars the total amounts of the Company's sales for 1952 and 1953 of

1) all products containing soap or synthetic detergents (other than those products covered by the reports specified in sub-paragraphs A) and B) *supra*)
2) glycerine
3) all inedible products (except glycerine) not containing soap or synthetic detergents
4) all edible products (except glycerine).

[fol. 218] E) Records which show for 1952 and 1953, with respect to sales of glycerine by the Company:

1) total sales of each grade (in dollars)
2) total sales of each grade (by weight).

24: All memoranda and correspondence prepared, sent or received during, or covering, the period January 1, 1946 through June 30, 1954 relating to comparative washing tests and detergent evaluations of any Company household soap or synthetic detergent brand with any brand or brands of other companies, including reports setting forth the results of such tests.

Dated: August 20, 1954.

(S.) Joseph E. McDowell, (S.) Robert Brown, Jr., (S.) Charles L. Kent, (S.) Daniel H. Margolis, Trial Attorneys.

Stanley N. Barnes, Assistant Attorney General. Victor H. Kramer, Trial Attorney.

[fol. 219] AFFIDAVIT IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA, ss.

Joseph E. McDowell, being first duly sworn, says, upon information and belief:

That he is an attorney for the United States Department of Justice and is engaged in the preparation of this case on behalf of the United States of America, the plaintiff herein.

The pleadings herein pose two broad issues: (1) whether the defendants have been engaged since 1926 in a continuing combination and conspiracy to restrain and to monopolize trade and commerce among the several States in the production and sale of household soap and household synthetic detergents, in violation of sections 1 and 2 of the Sherman Act; and (2) whether the defendants Procter, Colgate and Lever are now monopolizing and, for at least fifteen years prior to the filing of this complaint, have continuously monopolized such trade and commerce, in violation of section 2 of the Sherman Act.

The scope and nature of these issues is indicated in the numerous specific allegations set forth in the complaint concerning concerted activities of the defendants in furtherance of their objectives. Pursuant to the defendant's pur-[fol. 220] pose to restrict and control competition and to attain and exploit positions of dominance over all others engaged in producing and selling household soap and synthetic detergents, it is alleged that Procter, Lever, and Colgate have employed the following means, among others:

(1) exchanging information concerning prices, terms and conditions of sale, advertising and promotional methods, raw materials and other details of their business;

(2) controlling and fixing prices at which their brands are sold by themselves and by retailers;

(3) controlling and regulating their use of advertising and promofional methods;

(4) sharing by cross licenses to the exclusion of others, significant patents and patent rights;

(5) employing methods of conponing, special deals and other promotional devices designed to secure advantages for the defendants' brands in the allocation of retail shelf space and to obstruct the promotion and sale of household soap and synthetic detergents produced by other manufacturers;

(6) inducing principal producers of base materials for synthetic detergents to concentrate upon the production of these materials for sale to Procter, Lever, and Colgate and to discontinue or curtail production of synthetic detergents;

(7) restricting and controlling competition in the production and sale of glycerine by curtailing production, fixing prices, and exchanging information;

(8) exchanging information concerning raw material purchases, prices, and supplies;

(9) obtaining discriminatory preferences over other purchasers of raw materials used in the production of soap;

(10) making "confidential deals" in which prices are concealed in order to avoid affecting published market prices or the market positions of other buyers and sellers;

(11) manipulating and fixing prices at which they purchase inedible tallow and grease and other raw materials; and

(12) purchasing and agreeing to purchase substantially all of the available supplies of petroleum base materials used in the production of synthetic detergents.

The documents and records described in the accompanying motion either relate directly to specific issues thus posed or must be examined in connection with relevant questions [fol. 221] concerning the defendant's power and purpose to monopolize. All of such documents and records are in the possession of the Colgate-Palmolive-Peet Company, or subject to its control, if they are in existence at this time. With minor exceptions, all of these are either supplementary to documents and records previously furnished by the Company, or relate to matters with respect to which substantial

information has already been furnished by the Company and the other defendants herein in the course of the investigation of the soap and synthetic detergent industry conducted by the Department of Justice prior to the institution of this action.

Proof of the unlawful activities with which this defendant is charged necessarily involves the careful accumulation of all relevant documentary material.

The production of the documents and records described in the attached motion is necessary to the preparation of the case and will expedite the determination of the issues and the disposition of the cause.

Joseph E. McDowell, Trial Attorney, United States Department of Justice.

Subscribed and sworn to before me on this 20 day of August, 1954.

Sarah B. McGrann, Notary Public.

My Commission expires May 1, 1956. (Seal).

[fol. 221a] [File endorsement omitted]

[fol. 222] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION

To: Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey. Dinsmore, Shohl, Sawyer & Dinsmore, Union Central Building, Cincinnati, Ohio. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 13th day of September, 1954, at 10:00 A.M., or at such other time thereafter as may be set at the convenience of the Court on notice to you.

Dated: August 20, 1954.

(S.) Joseph E. McDowell. (S.) Robert Brown, Jr. Charles L. Kent, Daniel H. Margolis, Trial Attorneys.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 223] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION FOR THE DISCOVERY AND PRODUCTION OF DOCUMENTS UNDER RULE 34—Filed August 23, 1954

The plaintiff moves the Court for an order requiring defendant The Procter & Gamble Company to produce and permit the plaintiff to inspect and copy, by photostating or other appropriate means, the hereinafter described documents. These documents constitute or contain evidence relevant or material to the issues involved in this action, as is more fully shown in the affidavit attached thereto. This defendant has possession, custody or control of these documents.

1. Profit and loss statements and balance sheets for each accounting year ending in the period from July 1, 1951 to June 30, 1954 for the Company and for each domestic subsidiary and each manufacturing and sales department or division thereof engaged in the manufacture or sale of soap or synthetic detergents.

2. Records or work books for the period January 1, 1946 to June 30, 1954, showing monthly estimates of departmental expenses and profits and losses for the departments, divisions and sub-divisions of the Company engaged in the production or sale of soap or synthetic detergents.

[fol. 224] 3. All published price lists for soap, synthetic detergents and glycerine issued by the Company and by any of its domestic subsidiaries engaged in the production or sale of soap, synthetic detergents or glycerine for the period from January 1, 1952 through June 30, 1954.

4. Records kept by the Company's Sales Department showing prices at which household soaps and household synthetic detergents were offered for sale by the Company and by other manufacturers during the period from January 1, 1936 through June 30, 1954.

5. Records or work books showing for each plant of the Company

a) estimated prices
b) estimated selling prices
c) estimated sales costs
d) factory costs
e) delivered costs
f) unit cost of each ingredient
g) unit quantity of each ingredient
h) total costs to make and sell exclusive of delivery expense
i) estimated profits
j) net profits

which were prepared by or for the Company during the period January 1, 1946 through June 30, 1954, and for each package unit and form including bars, beads, chips, flakes, granules, powders and liquids of the following brands: Amber, American Family, Bonus, Bright Sail, Camay, Cheer, Chipso, Dash, Dreft, Duz, Ivory, Joy, Oxydol, Ozonite, Saratoga, Selox Tide, P&G White Naphtha, and White Crown.

6. All market surveys, charts, tables and schedules, together with memoranda and correspondence relating thereto, prepared during or covering the periods from January 1, 1946 to December 31, 1946 and from January 1, 1950 to June 30, 1954 which show for any area or areas for any household soap, household synthetic detergent, detergent base material, tallow, grease, glycerine, or any combinations thereof

[fol. 225] A) as to any other company or companies:

1) production
2) sales
3) purchases
4) promotional expenditures
5) inventories
6) prices
7) costs
8) profits

B) as to any company or companies: the proportion of participation as to

1) production
2) sales
3) purchases
4) promotional expenditures
5) inventories

7. All licenses, sublicenses, or other contracts or agreements concerning patents or patent applications, relating to spray-dried soap, spray-dried synthetic detergents, phosphate builders for soap or synthetic detergent, and synthetic detergent base compounds including alkylated hydrocarbons, aliphatic hydrocarbons, higher fatty alcohols and derivatives of such compounds, to which the Company was a party during the period from January 1, 1951 through June 30, 1954.

8. All memoranda or correspondence relating to the matters specified in the following sub-paragraphs, prepared, sent or received during, or covering, the periods indicated in each such sub-paragraph:

A) during the period November 1, 1949 through June 30, 1954 concerning Civil Action No. 2429, Colgate-Palmolive-Peet Co. v. The Procter & Gamble Co., U. S. District Court, Southern District of Ohio, on Pat. Nos. 2,486,921 and 2,486,922.

[fol. 226] B) during the period January 1, 1951 through June 30, 1954 concerning any patent or patent application included in the subject matter of the following agreements and all amendments thereto relating to spray-dried soap or detergents:

Agreement	Date
Procter & Gamble Co. and Colgate-Palmolive-Peet Co. (Domestic Patents)	3/21/29
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and D. R. Lamont	10/16/30
Procter & Gamble Co., Colgate-Palmolive-Peet Co. and Lever Bros. Co. (Release to Procter and Colgate)	12/22/37

Agreement	Date
Lever Bros. Co., Colgate-Palmolive-Peet Co. and Procter & Gamble Co. (License to Procter and Colgate)	12/22/37
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and Lever Bros. Co. (Release to Lever	12/22/37
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and Lever Bros. Co. (License to Lever)	12/22/37
Colgate-Palmolive-Peet Co., Lever Bros. Co. and Procter & Gamble Co. (Memorandum of Settlement Agrt.)	12/28/37
Colgate-Palmolive-Peet Co. and Procter & Gamble Co. (Amdt. of Par. 3 of agrt. dated 3/21/29)	10/24/49

and referring to:

1) procuring or obtaining licenses or sublicenses under patents or patent applications
2) the terms or provisions, actual or proposed, of licenses or sublicenses issued or proposed to be issued under patents or patent applications
3) instructions or other information furnished to licensees or sublicensees under patents or patent applications
4) the granting or issuing of licenses or sublicenses under patents or patent applications
5) refusals to grant, or cancellations of, licenses or sublicenses under patents or patent applications
[fol. 227] 6) the payment of, or exemptions from the payment of, royalties or other compensation of licenses or sublicenses under patents or patent applications
7) the validity or invalidity of any patent or patent application
8) patent interference proceedings and infringement litigation; settlement of, negotiations for settlement of, and threats to institute such litigation or proceedings

9) conditions or restrictions upon the use of patents or upon the use by licensees or sublicensees of patented products, materials, or devices, or upon the manufacture, sale or use by licensees or sublicensees of products, materials, or devices manufactured under patented processes or methods

10) prices charged or to be charged by licensees or sublicensees under patents for products, materials, or devices.

C) negotiations during the period January 1, 1949 to June 30, 1954 for the procurement of synthetic detergent petroleum base materials.

D) negotiations during the period January 1, 1946 to June 30, 1954 for the procurement of:

1) tetrasodium pyrophosphate and sodium tripolyphosphate

2) finished synthetic detergents.

E) construction by the supplier during the period January 1, 1946 to June 30, 1954 of production or processing facilities for synthetic detergent base materials or phosphates.

F) negotiations during the period January 1, 1946 to June 30, 1954 for processing for the Company of synthetic detergent base materials obtained from third parties.

9. With respect to the production of synthetic detergents, and plans therefor, all production schedules and estimates, analyses and estimates of base material requirements, and sales estimates, plans and projections for the [fol. 228] period from January 1, 1946 through December 31, 1948, together with all memoranda and correspondence relating thereto and prepared, sent or received during, or covering, such period.

10. All contracts, agreements, and amendments thereto between the Company and any seller of synthetic detergent petroleum base materials, including but not limited to sulfonated and unsulfonated alkylated hydrocarbons, by which the Company agreed to purchase:

a) the seller's output of any type or types of synthetic detergent base

b) stated percentages of the seller's output of any type or types of synthetic detergent base
c) amounts of synthetic detergent base to be delivered over a period of time

and which were in effect at any time during the period January 1, 1949 through June 30, 1954.

11. With respect to all price changes on household soap and household synthetic detergent products effectuated during the period from January 1, 1946 to June 30, 1954, all memoranda and correspondence prepared, sent or received during, or covering, such period, recommending, approving or authorizing such changes, or setting forth or relating to:

a) prices of other manufacturers
b) raw material prices, factory costs, promotional and advertising expenditures, other sales and administrative expenses, total costs
c) effect on profits
d) terms or conditions of sale
e) composition of products
f) package weights.

12. All market surveys, tabulations, memoranda, and correspondence prepared, sent or received during, or covering, the period from January 1, 1950 to June 30, 1954 showing or relating to shelf prices charged by retailers for household soap and household synthetic detergent products.

[fol. 229] 13. Records showing each purchase of tallow or grease made by the Company for the following months:

a) November, 1946
b) March and November, 1947
c) January, 1948
d) September and November, 1950
e) January, 1951
f) December, 1953

and as to each such purchase the date, weight, grade, price per pound, f.o.b. point, delivery point, terms and conditions of sale, name and address of the seller, name of the broker (if any), and amount of any commission paid by the Company and the name and address of the recipient thereof.

14. All contracts or agreements, and amendments thereto, not already produced, between the Company and any seller of tallow or grease which were in effect at any time during the years 1938 through 1953, inclusive, and which called for delivery to the Company for a period of three months or more of:

a) the total amount of any grade or grades of the seller's tallow or grease

b) stated amounts of any grade or grades of the seller's tallow or grease.

15. All memoranda, instructions, or correspondence prepared, sent or received during, or covering, the periods from January 1, 1939 through December 31, 1941 and from January 1, 1947 through June 30, 1954 concerning purchases of tallow or grease and referring to prices, withholding or disclosing of prices, supplies, purchases by other buyers, timing of purchases, any bonus or system of paying bonuses to suppliers for better quality tallow or grease, and/or market studies and analyses.

16. All memoranda and correspondence prepared, sent or received during, or covering, the years 1947 through 1951 inclusive and referring

a) to the termination or the proposed termination of the "official New York market price" for tallow or grease, and

b) to the criteria to be employed in determining the price of tallow or grease.

[fol. 230] 17. A) The tri-party Agreement establishing brand quotas or other limitations on the advertising and promotional expenses of each of the participants, which was entered into by the Company, Colgate-Palmolive-Peet, and Lever Brothers in or about January, 1938.

B) All reports, memoranda and correspondence relating to the negotiations which were commenced on or about January 12, 1938 between representatives of the Company and Colgate-Palmolive-Peet and/or Lever Brothers which resulted in the tri-party Agreement described in sub-paragraph A) *supra*.

C) All memoranda and correspondence relating to the triparty Agreement of 1938 described in sub-paragraph A) *supra*, or to meetings of representatives of the Company, Colgate-Palmolive-Peet and/or Lever Brothers, regarding details of this Agreement, including but not limited to the statement prepared by the representatives of the Company showing their understanding of the points settled at the meeting of April 6, 1938 in New York City.

18. A) Records showing total Advertising Expenditures and Brand Sales Promotion by months from January 1, 1952 through June 30, 1954, for each of the Company's brands of household soap and synthetic detergent products.

B) Records showing expenditures in each sales division, district and city for each type of Brand Sales Promotion for which total expenditures are recorded in the Brand Sales Promotion records referred to in sub-paragraph A), *supra*, by months, from January 1, 1935 to December 31, 1941, and from January 1, 1946 to June 30, 1954, for each of the Company's household soap and synthetic detergent products.

[fol. 231] 19. All memoranda and correspondence, prepared, sent or received during, or covering, the periods from January 1, 1937 to December 31, 1942, and from January 1, 1946 to June 30, 1954 relating to the discontinuance or limitation, or the proposed discontinuance or limitation, by the Company, Colgate-Palmolive-Peet, Lever Brothers, and/or any other manufacturer, of one-cent sales, other special sales, special factory packs, premiums, or special advertising allowances (including count and recount sales plans) in any city, state, or region of, or throughout, the United States.

20. All competitive activity reports of the Company, including reports, studies, tabulations, and surveys prepared by each Division, and reports, studies, tabulations, and surveys prepared by the Home Office, showing the cities, towns, and other larger and smaller territories in which other manufacturers couponed, offered consumer deals, or engaged in other promotional activities, for the years 1935 through 1939 inclusive and 1946 through June 30, 1954.

21. Records showing for each sales district, and for each sales unit or lesser sales area for which such records are kept.

a) number of coupons of each type
b) number of special packs of each type

distributed for each of the Company's brands of household soap and household synthetic detergents during each year, quarter, and month or other period for which such records were compiled from January 1, 1946 to June 30, 1954.

22. All market surveys, tabulations, charts, memoranda, and correspondence relating to the planning, objectives, conduct or results of each of the following promotional campaigns, without limitation to documents relating only to the Districts or regions specified, if such Districts or regions constituted only part of the area in which the promotional campaign was being conducted:

[fol. 232]

1) Duz couponing being conducted:

a) in or about April, 1950 in the North Dallas or South Dallas Districts, or regions, or both; and
b) in or about April, 1950 in the Denver and St. Louis Districts or regions.

2) Oxydol couponing being conducted:

a) in or about June, 1949 in the Philadelphia District or region;
b) in or about March, 1950 in the Philadelphia District or region;
c) in or about March, 1950 in the Chicago, Kansas City and Omaha Districts or regions; and
d) in or about March, 1950 in the Cleveland District or region.

3) Camay factory pack promotions being conducted in or about April, 1950 in the New Orleans and Syracuse Districts or regions.

4) Camay couponing being conducted:

a) in or about April, 1950 in the North Dallas or South Dallas Districts or regions; and

b) in or about April, 1950 in the Atlanta, Memphis and New Orleans Districts or regions.

5) Tide couponing being conducted:

a) in or about February, 1950 in the Cincinnati District or region; and
b) in or about February, 1950 in the Los Angeles District or region.

6) Dreft couponing being conducted:

a) in or about February, 1950 in the Los Angeles District or region;
b) in or about February, 1950 in the Cincinnati District or region; and
c) in or about February, 1950 in the Memphis District or region.

7) Ivory Flakes couponing being conducted:

a) in or about March, 1950 in the Omaha District or region; and
b) in or about March, 1950 in the Syracuse District or region.

8) Ivory Flakes premium deal being offered in or about the period March-July, 1950 in the Detroit, Syracuse; and Omaha Districts or regions.

23. A) Records (or copies of reports) showing sales of soap and synthetic detergents by product categories as reported to the Association of American Soap and Glycerine Producers, Inc. for the period from January 1, 1952 through June 30, 1954.
[fol. 233] B) Records (or copies of reports) showing sales and shipments of soap and synthetic detergents by product categories as submitted to the Bureau of Census of the United States Department of Commerce for the period from January 1, 1952 through June 30, 1954.

C) Records showing number of cases of soap and synthetic detergents, by brands, sold or shipped by the Company during each month from January 1, 1952 through June 30, 1954.

D) Records which show in dollars the total amounts of the Company's sales for 1952 and 1953 of

1) all products containing soap or synthetic detergents (other than those products covered by the reports specified in sub-paragraphs A) and B), *supra*)
2) glycerine
3) all inedible products (except glycerine) not containing soap or synthetic detergents
4) all edible products (except glycerine).

E) Records which show for 1952 and 1953, with respect to sales of glycerine by the Company:

1) total sales of each grade (in dollars)
2) total sales of each grade (by weight).

24. All memoranda and correspondence prepared, sent or received during, or covering, the period January 1, 1946 through June 30, 1954, relating to comparative washing tests and detergent evaluations of any Company household soap or synthetic detergent brand with any brand or brands of other companies, including reports setting forth the results of such tests.

25. All memoranda and correspondence prepared, sent or received during, or covering, the period from January 1, 1947 to December 31, 1948, relating to negotiations by the Company for the purchase of rights to the product "Glim" from the General Aniline & Film Corporation.

[fol. 234] Dated: August 20, 1954.

Stanley N. Barnes, Assistant Attorney General. Victor H. Kramer, Trial Attorney.

(S.) Joseph E. McDowell, (S.) Robert Brown, Jr. (S.) Charles L. Kent, (S.) Daniel H. Margolis, Trial Attorneys.

[fol. 235] AFFIDAVIT IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA, ss:

JOSEPH E. MCDOWELL, being first duly sworn, says, upon information and belief:

That he is an attorney for the United States Department of Justice and is engaged in the preparation of this case

on behalf of the United States of America, the plaintiff herein.

The pleadings herein pose two broad issues: (1) whether the defendants have been engaged since 1926 in a continuing combination and conspiracy to restrain and to monopolize trade and commerce among the several States in the production and sale of household soap and household synthetic detergents, in violation of sections 1 and 2 of the Sherman Act; and (2) whether the defendants Procter, Colgate and Lever are now monopolizing and, for at least fifteen years prior to the filing of this complaint, have continuously monopolized such trade and commerce, in violation of section 2 of the Sherman Act.

The scope and nature of these issues is indicated in the numerous specific allegations set forth in the complaint concerning concerted activities of the defendants in furtherance of their objectives. Pursuant to the defendants' pur- [fol. 236] pose to restrict and control competition and to attain and exploit positions of dominance over all others engaged in producing and selling household soap and synthetic detergents, it is alleged that Procter, Lever, and Colgate have employed the following means, among others:

(1) exchanging information concerning prices, terms and conditions of sale, advertising and promotional methods, raw materials and other details of their business;

(2) controlling and fixing prices at which their brands are sold by themselves and by retailers;

(3) controlling and regulating their use of advertising and promotional methods;

(4) sharing, by cross licenses to the exclusion of others, significant patents and patent rights;

(5) employing methods of couponing, special deals and other promotional devices designed to secure advantages for the defendants' brands in the allocation of retail shelf space and to obstruct the promotion and sale of household soap and synthetic detergents produced by other manufacturers;

(6) inducing principal producers of base materials for synthetic detergents to concentrate upon the production of these materials for sale to Procter,

Lever, and Colgate and to discontinue or curtail production of synthetic detergents;

(7) restricting and controlling competition in the production and sale of glycerine by curtailing production, fixing prices, and exchanging information;

(8) exchanging information concerning raw material purchases, prices, and supplies;

(9) obtaining discriminatory preferences over other purchasers of raw materials used in the production of soap;

(10) making "confidential deals" in which prices are concealed in order to avoid affecting published market prices or the market positions of other buyers and sellers;

(11) manipulating and fixing prices at which they purchase inedible tallow and grease and other raw materials; and

(12) purchasing and agreeing to purchase substantially all of the available supplies of petroleum base materials used in the production of synthetic detergents.

The documents and records described in the accompanying motion either relate directly to specific issues thus posed or must be examined in connection with relevant questions [fol. 237] concerning the defendants' power and purpose to monopolize. All of such documents and records are in the possession of The Procter & Gamble Company, or subject to its control, if they are in existence at this time. With minor exceptions, all of these are either supplementary to documents and records previously furnished by the Company, or relate to matters with respect to which substantial information has already been furnished by the Company and the other defendants herein in the course of the investigation of the soap and synthetic detergent industry conducted by the Department of Justice prior to the institution of this action.

Proof of the unlawful activities with which this defendant is charged necessarily involves the careful accumulation of all relevant documentary material.

The production of the documents and records described in the attached motion is necessary to the preparation of the

case and will expedite the determination of the issues and the disposition of the cause.

Joseph E. McDowell, Trial Attorney, United States Department of Justice.

Subscribed and sworn to before me on this 20 ~~day~~ of August, 1954.

Sarah B. McGrann, Notary Public.

My Commission expires May 1, 1956.

[fol. 237a]] File endorsement omitted]

[fol. 238] In the United States District Court

Notice of Motion

To: Arnold, Fortas and Porter 1229-19th Street, N.W. Washington, D. C. Bailey, Schenck & Bennett, 744 Broad Street, Newark, New Jersey.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 13th day of September, 1954, at 10:00 A.M., or at such other time thereafter as may be set at the convenience of the Court on notice to you.

Dated: August 20, 1954.

(S.) Joseph E. McDowell, (S.) Robert Brown, Jr., (S.) Charles L. Kent, (S.) Daniel H. Margolis, Trial Attorneys.

Certificate of Service (omitted in printing)

[fol. 239] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS UNDER RULE 34—Filed August 23, 1954

The plaintiff moves the Court for an order requiring defendant Lever Brothers Company to produce and permit the plaintiff to inspect and copy, by photostating or other appropriate means, the hereinafter described documents. These documents constitute or contain evidence relevant or material to the issues involved in this action, as is more fully shown in the affidavit attached hereto. This defendant has possession, custody or control of these documents.

1. Profit and loss statements and balance sheets for the years 1952 and 1953 for each of the Company's manufacturing and sales departments or divisions thereof engaged in the manufacture or sale of soap or synthetic detergents.

2. Records or work books for the period January 1, 1946 to June 30, 1954, showing monthly estimates of departmental expenses and profits and losses for the departments, divisions and sub-divisions of the Company engaged in the production or sale of soap or synthetic detergents.

3. All published price lists for soap, synthetic detergents and glycerine issued by the Company for the period Janu-
[fol. 240] ary 1, 1952 through June 30, 1954.

4. Entries from April 13, 1952 through June 30, 1954 continuing the records produced pursuant to prior order showing prices at which household soaps and household synthetic detergents were offered for sale by the Company and by other manufacturers during such period.

5. Records or work books showing for each plant of the Company

a) brand statements showing costs
b) factory costs per case
c) unit cost of each ingredient
d) unit quantity of each ingredient
e) total cost to make and sell exclusive of delivery expense
f) delivered costs

g) brand costs and margins per standard case detergents (excluding export)
h) estimated profits
i) net profits.

which were prepared by or for the Company during the period January 1, 1946 through June 30, 1954, and for each package unit and form, including bars, beads, chips, flakes, granules, powders, and liquids of the following brands: Breeze, Gold Dust, Lifebuoy, Lux, Rinso, Silver Dust, Surf and Swan.

6. All market surveys, charts, tables and schedules, together with memoranda and correspondence relating thereto, prepared during or covering the period from January 1, 1946 to December 31, 1946, and from January 1, 1950 to June 30, 1954, which show for any area or areas for any household soap, household synthetic detergent, detergent base material, tallow, grease, glycerine, or any combinations thereof

A) as to any other company or companies:

1) production
2) sales
3) purchases
4) promotional expenditures
5) inventories
6) prices
7) costs
8) profits

[fol. 241] B) as to any company or companies: the proportion of participation as to

1) production
2) sales
3) purchases
4) promotional expenditures
5) inventories

7. All licenses, sublicenses, or other contracts or agreements concerning patents or patent applications, relating to spray-dried soap, spray-dried synthetic detergents, phosphate builders for soap or synthetic detergent, and syn-

thetic detergent base compounds including alkylated hydrocarbons, aliphatic hydrocarbons, higher fatty alcohols and derivatives of such compounds, to which the Company was a party during the period from January 1, 1951 through June 30, 1954.

8. All memoranda or correspondence relating to the matters specified in the following sub-paragraphs, prepared, sent or received during, or covering, the periods indicated in each such sub-paragraph:

A) during the period November 1, 1949 through June 30, 1954 concerning Civil Action No. 2429, Colgate-Palmolive-Peet Co. v. The Procter & Gamble Co., U. S. District Court, Southern District of Ohio, on Pat. Nos. 2,486,921 and 2,486,922.

B) during the period January 1, 1951 through June 30, 1954 concerning any patent or patent application included in the subject matter of the following agreements and all amendments thereto relating to spray-dried soap or detergents:

Agreement	Date
Colgate-Palmolive-Peet Co., Procter & Gamble Co., and Lever Bros. Co. (Release to Procter and Colgate)	12/22/37
Lever Bros. Co., Colgate-Palmolive-Peet Co. and Procter & Gamble Co. (License to Procter and Colgate)	12/22/37
Colgate-Palmolive-Peet Co., Procter & Gamble Co. and Lever Bros. Co. (Release to Lever)	12/22/37
[fol. 242] Colgate-Palmolive-Peet Co., Procter & Gamble Co., and Lever Bros. Co. (License to Lever)	12/22/37
Colgate-Palmolive-Peet Co., Lever Bros. Co. and Procter & Gamble Co. (Memorandum of Settlement Agrt.)	12/28/37

and referring to:

1) procuring or obtaining licenses or sublicenses under patents or patent applications

2) the terms or provisions, actual or proposed, of licenses or sublicenses issued or proposed to be issued under patents or patent applications

3) instructions or other information furnished to licensees or sublicensees under patents or patent applications
4) the granting or issuing of licenses or sublicenses under patents or patent applications
5) refusals to grant, or cancellations of, licenses or sublicenses under patents or patent applications
6) the payment of, or exemptions from the payment of, royalties or other compensation of licenses or sublicenses under patents or patent applications
7) the validity or invalidity of any patent or patent application
8) patent interference proceedings and infringement litigation; settlement of, negotiations for settlement of, and threats to institute such litigation or proceedings
9) conditions or restrictions upon the use of patents or upon the use by licensees or sublicensees of patented products, materials, or devices, or upon the manufacture, sale or use by licensees or sublicensees of products, materials, or devices manufactured under patented processes or methods
10) prices charged or to be charged by licensees or sublicensees under patents for products, materials, or devices.

C) negotiations during the period January 1, 1949 to June 30, 1954 for the procurement of synthetic detergent petroleum-base materials.

D) negotiations during the period January 1, 1946 to June 30, 1954 for the procurement of:

1) tetrasodium pyrophosphate and sodium tripolyphosphate
2) finished synthetic detergents.

[fol. 243] E) construction by the supplier during the period January 1, 1946 to June 30, 1954 of production or processing facilities for synthetic detergent base materials or phosphates.

F) negotiations during the period January 1, 1946 to June 30, 1954 for processing for the Company of synthetic detergent base materials obtained from third parties.

9. With respect to the production of synthetic detergents, and plans therefor, all production schedules and estimates, analyses and estimates of base material requirements, and sales estimates, plans and projections for the period from January 1, 1946 through December 31, 1948, together with all memoranda and correspondence relating thereto, and prepared, sent or received during, or covering, such period.

10. All contracts, agreements, and amendments thereto between the Company and any seller of synthetic detergent petroleum base materials, including but not limited to sulfonated and unsulfonated alkylated hydrocarbons, by which the Company agreed to purchase:

a) the seller's output of any type or types of synthetic detergent base
b) stated percentages of the seller's output of any type or types of synthetic detergent base
c) amounts of synthetic detergent base to be delivered over a period of time

and which were in effect at any time during the period January 1, 1949 through June 30, 1954.

11. With respect to all price changes on household soap and household synthetic detergents, effectuated during the period from January 1, 1946 to June 30, 1954, all memoranda and correspondence prepared, sent or received during, or covering, such period, recommending, approving or authorizing such changes, or setting forth or relating to:

[fol. 244] a) prices of other manufacturers
b) raw material prices, factory costs, promotional and advertising expenditures, other sales and administrative expenses, total costs
c) effects on profits
d) terms or conditions of sale
e) composition of products
f) package weights.

12. All market surveys, tabulations, memoranda, and correspondence prepared, sent or received during, or covering, the period from January 1, 1950 to June 30, 1954 showing shelf prices charged by retailers for household soap and household synthetic detergents.

13. Records showing each purchase of tallow or grease made by the Company for the following months:

a) November, 1946
b) March and November, 1947
c) January, 1948
d) September and November, 1950
e) January, 1951
f) December, 1953

and as to each such purchase the date, weight, grade, price per pound, f.o.b. point, delivery point, terms and conditions of sale, name and address of the seller, name of the broker (if any), and amount of any commission paid by the Company and the name and address of the recipient thereof.

14. All contracts or agreements, and amendments thereto, not already produced, between the Company and any seller of tallow or grease which were in effect at any time during the years 1938 through 1953, inclusive, and which called for delivery to the Company for a period of three months or more of:

a) the total amount of any grade or grades of the seller's tallow or grease
b) stated amounts of any grade or grades of the seller's tallow or grease.

15. All memoranda, instructions, or correspondence prepared, sent or received during, or covering, the periods from January 1, 1939 through December 31, 1941 and from [fol. 245] January 1, 1947 through June 30, 1954 concerning purchases of tallow or grease and referring to prices, withholding or disclosing of prices, supplies, purchases by other buyers, timing of purchases, any bonus or system of paying bonuses to suppliers for better quality tallow or grease, and/or market studies and analyses.

16. All memoranda and correspondence prepared, sent or received during, or covering, the period 1947 through 1951, inclusive, and referring

a) to the termination or the proposed termination of the "official New York market price" for tallow or grease, and
b) to the criteria to be employed in determining the price of tallow or grease.

17. A) The tri-party Agreement establishing brand quotas or other limitations on the advertising and promotional expenses of each of the participants, which was entered into by the Company, Colgate-Palmolive-Peet, and Procter & Gamble in or about January, 1938.

B) All reports, memoranda and correspondence relating to the negotiations which were commenced on or about January 12, 1938 between representatives of the Company and Colgate-Palmolive-Peet and/or Procter & Gamble which resulted in the tri-party Agreement described in sub-paragraph A) *supra*.

C) All memoranda and correspondence relating to the tri-party Agreement of 1938 described in sub-paragraph A) *supra*, or to meetings of representatives of the Company, Colgate-Palmolive-Peet and/or Procter & Gamble, regarding details of this Agreement.

18. A) Records showing Advertising and Sales Promotion Costs (or Merchandising Costs) in Totals and Per Case by Divisions, Advertising and Adjusted Sales [fol. 246] Plan Expenditures, and Advertising Expense Allowance, showing advertising and promotional expenditures in each sales division and sales district by months from January 1, 1952 through June 30, 1954, for each of the Company's brands of household soap and synthetic detergent products.

B) Records showing expenditures in each sales division, district and city for each type of brand sales promotion for which total expenditures are recorded in the records referred to in sub-paragraph A), *supra*, by months, from January 1, 1935 to December 31, 1941, and from January 1, 1946 to June 30, 1954, for each of the Company's household soap and household synthetic detergent products.

19. All memoranda and correspondence prepared, sent or received during, or covering, the periods from January 1, 1937 to December 31, 1942, and from January 1, 1946 to June 30, 1954, relating to the discontinuance or limitation, or the proposed discontinuance or limitation, by the Company, Colgate-Palmolive-Peet, Procter & Gamble, and/or any other manufacturer, of one-cent sales, other special sales, special factory packs, premiums, or special adver-

tising allowances (including count and recount sales plans) in any city, state, or region of, or throughout, the United States.

20. All competitive activity reports of the Company showing the cities, towns, and other larger and smaller territories in which other manufacturers couponed, offered consumer deals, or engaged in other promotional activities, for the years 1935 through 1939, inclusive, and 1946 through June 30, 1954, inclusive.

21. Records showing for each sales district, and for each sales unit or lesser sales area for which such records are kept

a) number of coupons of each type
b) number of special packs of each type

distributed for each of the Company's brands of household [fol. 247] soap and household synthetic detergents during each year, quarter, and month, or other period for which such records were compiled from January 1, 1946 to June 30, 1954.

22. All market surveys, tabulations, charts, memoranda, and correspondence relating to the planning, objectives, conduct or results of each of the following promotional campaigns, without limitation to documents relating only to the regions specified, if such regions constituted only part of the area in which the promotional campaign was being conducted:

1) Rinso couponing campaigns which were being conducted.

a) in or about May, 1950 in the Chicago, Cincinnati, Cleveland, Detroit, Minneapolis, Baltimore and Pittsburgh regions; and
b) in or about September, 1949 in the Memphis, New Orleans, Richmond, Cincinnati, Boston, Philadelphia and Syracuse regions.

2) Lux soap couponing campaigns which were being conducted in or about January, 1950 in the Syracuse, Cincinnati and Minneapolis regions.

3) Surf couponing campaigns which were being conducted in or about May, 1950 in Chicago, Cincinnati, Cleveland, Kansas City and St. Louis regions.

4) Lux Flakes handkerchief premium campaigns which were being conducted in or about March, 1950 in the Philadelphia, Syracuse and St. Louis regions.

23. A) Records (or copies of reports) showing sales of soap and synthetic detergents by product categories as reported to the Association of American Soap and Glycerine Producers, Inc. for the period from January 1, 1952 through June 30, 1954.

B) Records (or copies of reports) showing sales and shipments of soap and synthetic detergents by product categories as submitted to the Bureau of Census of the United States Department of Commerce for period from [fol. 248] January 1, 1952 through June 30, 1954.

C) Records showing sales in dollars and by weight and number of cases of soap and synthetic detergents by brands sold or shipped by the Company during each quarter from January 1, 1952 through June 30, 1954.

D) Records which show in dollars the total amounts of the Company's sales for 1952 and 1953 of

1) all products containing soap or synthetic detergents (other than those products covered by the reports in sub-paragraph A) and B) *supra*)
2) glycerine
3) all inedible products (except glycerine) not containing soap or synthetic detergents
4) all edible products (except glycerine).

E) Records which show for 1952 and 1953, with respect to sales of glycerine by the Company:

1) total sales of each grade (in dollars)
2) total sales of each grade (by weight).

24. All memoranda and correspondence prepared, sent or received during, or covering, the period January 1, 1946 through June 30, 1954 relating to comparative washing tests and detergent evaluations of any Company household soap or synthetic detergent brand with any brand or brands

of other companies, including reports setting forth the results of such tests.

(S.) Joseph E. McDowell, (S.) Robert Brown Jr., (S.) Charles L. Kent (S.) Daniel H. Margolis, Trial Attorneys.

Dated: August 20, 1954.

Stanley N. Barnes, Assistant Attorney General. Victor H. Kramer, Trial Attorney.

[fol. 249] AFFIDAVIT IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA, ss:

JOSEPH E. McDOWELL, being first duly sworn, says upon information and belief:

That he is an attorney for the United States Department of Justice and is ingaged in the preparation of this case on behalf of the United States of America, the plaintiff herein.

The pleadings herein pose two broad issues: (1) whether the defendants have been engaged since 1926 in a continuing combination and conspiracy to restrain and to monopolize trade and commerce among the several States in the production and sale of household soap and household synthetic detergents, in violation of sections 1 and 2 of the Sherman Act; and (2) whether the defendants Procter, Colgate and Lever are now monopolizing and, for at least fifteen years prior to the filing of this complaint, have continuously monopolized such trade and commerce, in violation of section 2 of the Sherman Act.

The scope and nature of these issues is indicated in the numerous specific allegations set forth in the complaint concerning concerted activities of the defendants in furtherance [fol. 250] of their objectives. Pursuant to the defendants' purpose to restrict and control competition and to attain and exploit positions of dominance over all others engaged in producing and selling household soap and synthetic detergents, it is alleged that Procter, Lever, and Colgate have employed the following means, among others:

(1) exchanging information concerning prices, terms and conditions of sale, advertising and promo-

tional methods, raw materials and other details of their business;

(2) controlling and fixing prices at which their brands are sold by themselves and by retailers;

(3) controlling and regulating their use of advertising and promotional methods;

(4) sharing, by cross licenses to the exclusion of others, significant patents and patent rights;

(5) employing methods of couponing, special deals and other promotional devices designed to secure advantages for the defendants' brands in the allocation of retail shelf space and to obstruct the promotion and sale of household soap and synthetic detergents produced by other manufacturers;

(6) inducing principal producers of base materials for synthetic detergents to concentrate upon the production of these materials for sale to Procter, Lever, and Colgate and to discontinue or curtail production of synthetic detergents;

(7) restricting and controlling competition in the production and sale of glycerine by curtailing production, fixing prices, and exchanging information;

(8) exchanging information concerning raw material purchases, prices, and supplies;

(9) obtaining discriminatory preferences over other purchasers of raw materials used in the production of soap;

(10) making "confidential deals" in which prices are concealed in order to avoid affecting published market prices or the market positions of other buyers and sellers;

(11) manipulating and fixing prices at which they purchase inedible tallow and grease and other raw materials; and

(12) purchasing and agreeing to purchase substantially all of the available supplies of petroleum base materials used in the production of synthetic detergents.

The documents and records described in the accompanying motion either relate directly to specific issues thus [fol. 251] posed or must be examined in connection with

relevant questions concerning the defendants' power and purpose to monopolize. All of such documents and records are in the possession of Lever Brothers Company, or subject to its control, if they are in existence at this time. With minor exceptions, all of these are either supplementary to documents and records previously furnished by the Company, or relate to matters with respect to which substantial information has already been furnished by the Company and the other defendants herein in the course of the investigation of the soap and synthetic detergent industry conducted by the Department of Justice prior to the institution of this action.

Proof of the unlawful activities with which this defendant is charged necessarily involves the careful accumulation of all relevant documentary material.

The production of the documents and records described in the attached motion is necessary to the preparation of the case and will expedite the determination of the issues and the disposition of the cause.

(S.) Joseph E. McDowell, Trial Attorney, United States Department of Justice.

Subscribed and sworn to before me on this 20 day of August, 1954.

Sara B. McGrann, Notary Public. [Seal.]

My Commission expires May 1, 1956.

[fols. 251a-264] [File endorsement omitted.]

[fol. 265] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF HEARING OF MOTION—Filed September 24, 1954

To: Raymond Del Tufo, Jr., Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Joseph E. McDowell, Esq., Special Assistant

to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Mathias F. Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington 6, D. C. James T. Welch, Esq., Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C.

SIRS:

Please take notice that the undersigned will bring the within motion on for hearing before this Court at the Federal Building, Newark, New Jersey, on the 25th day of [fol. 266] October, 1954, at 10 a.m., or at such other time as the Court may order.

Dated: September 24, 1954.

Yours, etc., Toner, Crowley, Woelper & Vanderbilt, John A. Ackerman per Kenneth Royall, 810 South Broad Street, Newark, New Jersey. Richard D. Barrett per Kenneth Royall. Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for Defendant, the Procter & Gamble Company.

[fol. 267] MOTION FOR ORDER DIRECTING DISCLOSURE OF GRAND JURY TRANSCRIPTS—Filed September 24, 1954.

The defendant, The Procter & Gamble Company (hereinafter called "Procter") respectfully moves the Court, pursuant to the discovery provisions of the Federal Rules of Civil Procedure and in accordance with the powers of this Court to act in the interest of justice with respect to litigation pending before it, for an order granting leave to Procter and its counsel to inspect and copy, commencing within ten (10) days after the entry of the order herein, the following documents or papers which are either in the possession or control of plaintiff and its counsel or are otherwise within the control of this Court:

The transcripts of the testimony of all witnesses taken before the Grand Jury of the United States District Court

for the District of New Jersey sitting in Newark from May 1951 to November 1952 in connection with an investigation of possible antitrust law violations in the soap and synthetic detergent industry. (See proceeding numbered Cr. [fol. 268] 174-51, 175-51, 176-51, 177-51.)

In support of this motion Procter shows to the Court, *inter alia*:

(a) The Grand Jury transcripts record testimony taken in connection with an investigation of whether there were violations of the antitrust laws by the movant and other members of the soap and synthetic detergent industry.

(b) The said transcripts plus the documents obtained by Grand Jury subpoena have been available to and used by the plaintiff in preparation for the instant civil action.

(c) Under orders issued in this case on May 27, 1953, and January 14, 1954, plaintiff, over protest of Procter, has been permitted to retain and use in this civil action documents and information produced in the Grand Jury proceeding which were obtained without the notice provided and the method prescribed for all parties by the Civil Rules and the Statutes.

(d) On the other hand, Procter has not had access to the Grand Jury transcripts, or to other information produced before the Grand Jury.

(e) The said Grand Jury was discharged on November 25, 1952, without returning any indictments against Procter or the other defendants and there is no pending criminal proceeding involving the evidence produced before the Grand Jury. The names of most if not all of those who appeared and testified before the said Grand Jury in connection with the investigation of the soap industry have been known for many months and it is believed that witnesses would have no objection to disclosure of their testimony. Procter does not seek to discover the deliberations or the votes of any Juror. No need exists for preserving the [fol. 269] secrecy of the said Grand Jury transcripts.

(f) The information contained in the Grand Jury transcripts is necessary to Procter for an adequate preparation of its defenses to this action, and is relevant to the matters alleged in the complaint. The relevancy of such transcripts in this civil action is supported by the fact that plaintiff, pursuant to Rule 34, sought and obtained from Procter in

this action the same documents which were produced by Procter before the said Grand Jury.

(g) Matters pertinent to Procter's defenses will never become known to Procter unless access to the Grand Jury transcripts is granted by this Court. Denial of such access would be unjust, discriminatory and prejudicial to Procter in this case and would be violative of the spirit and meaning of the Statutes and Rules and would deprive Procter of due process and equal protection of the laws and would be, therefore, violative of Amendment V of the Constitution of the United States.

At an appropriate time, when Procter believes it is in a position to frame requests of proper scope, Procter intends to move under Rule 34 of the Federal Rules of Civil Procedure for leave to inspect and copy documents and papers, in the possession or control of plaintiff, which were produced pursuant to the Grand Jury subpoenas as well as other documents and papers in the possession or control of plaintiff.

Dated: September 24, 1954.

Toner, Crowley, Woelper & Vanderbilt, John A. Ackerman per Kenneth Royall, 810 South Broad [fol. 270] Street, Newark, New Jersey. Richard W. Barrett, per Kenneth Royall, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 271] AFFIDAVIT OF KENNETH C. ROYALL

STATE OF NEW YORK,
County of New York, ss.:

KENNETH C. ROYALL, being duly sworn, deposes and says:

1. I am a member of the firm of Dwight, Royall, Harris, Koegel & Caskey, one of the attorneys for the defendant,

the Procter & Gamble Company (hereinafter called "Procter"), and am fully familiar with the proceedings heretofore had in the above-entitled matter.

2. The facts stated in the attached motion by Procter for an order directing disclosure of Grand Jury transcripts are true to the best of my knowledge, information and belief. Most of them are matters of record in this case.

3. No previous application for the same relief, or relief [fol. 272] similar to that sought herein, has been made.

Kenneth C. Royall.

Sworn to before me this 24th day of September, 1954.

Evelyn M. Hopkins, Notary Public. (Seal)

No. 36359

State of New York,
County of New York, ss.:

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal do hereby certify that Evelyn M. Hopkins, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In witness whereof, I have hereunto set my hand and affixed my official seal this 24 day of September, 1954.

Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County.

Fee paid 50¢.

[fol. 273] AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss.:

PAUL KERINS, being duly sworn, deposes and says:

That he is associated with Dwight, Royall, Harris, Koegel & Caskey, attorneys for The Procter & Gamble Company. That he is over 21 years of age, is not a party to this action and resides at 1 Bluebird Drive, Syosset, Long Island, New York.

That on the 24th day of September, 1954, he served the within Motion for Order Directing Disclosure of Grand Jury Transcripts, together with Notice of Hearing of Motion and Affidavit by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at No. 100 Broadway, Borough of Manhattan, City, County and State of New York, directed to the following persons, respectively, at the places indicated below:

Joseph E. McDowell, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C.

Mathias F. Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York, New York.

[fols. 274-275] Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington 6, D. C.

James T. Welch, Esq., Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C.

Paul Kerins.

Sworn to before me this 24th day of September, 1954.

Evelyn M. Hopkins, Notary Public. (Seal)

No. 36360

STATE OF NEW YORK,
County of New York, ss.:

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal do hereby certify that Evelyn M. Hopkins, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In witness whereof, I have hereunto set my hand and affixed my official seal this 24 day of September, 1954.

Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County.

Fee paid 50¢.

[fols. 275a-302] [File endorsement omitted]

[fols. 303-329] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

Newark, N. J.
October 14, 1954.

TRANSCRIPT OF HEARING

1. Hearing on motion and amended motion for discovery as to Lever Bros. Co.

2. Hearing on motion and amended motion for discovery as to Procter & Gamble Company.

3. Hearing on motion and amended motion for discovery as to Colgate-Palmolive-Peet Company.

Before the Honorable Alfred E. Modarelli, U.S.D.J.

* * * * * * *

[fol. 330-332] Mr. McDowell:

* * * * * * *

[fol. 333] Now, I would like to add, your Honor, that while it is true substantial numbers of documents were produced in response to Judge Forman's sustaining of those grand jury subpoenas, Judge Forman seriously limited, very substantially limited the production sought, and in many, many instances the production was placed upon a sample basis, for partial periods, and it was specifically and expressly contemplated by Judge Forman that the grand jury—the *the* Government would have to come back, if it was ever able to get through the matter within the period available before the grand jury, that it might have to come back for more documents to fill in some of these periods, to complete the picture partially disclosed by some of the documents [fol. 334] which were out, apparently, in the space of time allowed, and he would say, "Well, I have to let it go. I can't figure what that would come to without a machine."

But, your Honor, I have made no effort to check the performance on those documents which were ultimately ordered to be produced by Judge Forman as against those staggering estimates. But one little example just hap-

pened to come to my—one case happens to have come to my attention in the examination of tabulations of contracts with respect to the purchase of tallow and grease. I had noticed some estimate of that, so I went back and looked it up in the transcript. I have a note of it here. But a member of counsel had made the estimate that for his company alone the number of—I'm sorry, your Honor; would you bear with me just a moment till I get this figure here? His company alone—the number of these contracts involving the purchase of tallow and grease which would have to be produced for each year, or might have to be produced for each year, would run between seven hundred and fifty and a thousand contracts. And when you multiply the pages in the contracts, and so forth, and the number of years involved, it looked like a very substantial number. And it is, no question about it.

Now, in actual fact, the tabulation which I originally [fol. 335] made available.

And that is precisely our situation, your Honor. We are here in the posture where, notwithstanding the fact that admittedly many, many thousands, perhaps the million mentioned, of documents have been produced, and yet, as was specifically recognized by Judge Forman, there are gaps, there are inadequacies, there are places where the sample is too small to let sufficient conclusions be drawn, and yet large enough to indicate the necessity of further examination.

There are cases where the figures are incomplete. For example, on one item where we had asked for promotional expenditures, advertising and promotional expenditures, we first got just advertising from one of the companies, the grand jury went back on a later subpoena, and then it got the promotions from the same company. But in neither case—in the first case the advertising was broken down by divisions, which is extremely significant, because local marketing areas play a very important factor in this industry. But notwithstanding the two grand jury returns the material as supplied, upon full examination, discloses that it is not broken down to the divisions.

So we have to come back, your Honor. We have issues to which that is material, and which require tha' he Gov-

[fols. 336-855] ernment examine this matter before it can undertake to furnish—I come back to your Honor's point now—if I may—before we can undertake to do any more than cooperate in some informal discussion of the matter.

* * * * * * *

[fols. 856-862] In United States District Court, District of New Jersey

[Title omitted]

Newark, N. J.
April 19, 1955.

Transcript of Hearing on Submission of Consent Orders

Before The Honorable Alfred E. Modarelli, U.S.D.J.

* * * * * * * *

[fols. 863-865] Mr. Royall:

* * * * * * *

[fols. 866-879] Your Honor, a third point relates to the Government's answers to some of the questions propounded. As your Honor recalls, you allowed some questions, for the present did not allow others—not precluding them coming up later, but at this time did not allow them.

Without seeking to get into an agrument about it, we think in several particulars the Government failed to answer adequately even the questions as limited by your Honor. And we want to make it clear that our consent to the form of the proposed judgment does not indicate our approval of their answers, or the sufficiency of them; nor does it preclude, of course, Procter, and the other defendants, from seeking from the Court future orders relating to the questions which your Honor for the present did not require to be answered.

* * * * * * *

[fols. 880-881] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

Newark, N. J.
December 7, 1954.

TRANSCRIPT OF HEARING

1. Hearing on motion and amended motion for discovery as to Lever Bros. Co.

2. Hearing on motion and amended motion for discovery as to Procter & Gamble Company.

3. Hearing on motion and amended motion for discovery as to Colgate-Palmolive-Peet Company.

Before The Honorable Alfred E. Modarelli, U.S.D.J.

* * * * * * *

[fols. 882-883] The Court:

* * * * * * *

[fols. 884-1129] One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer, how long must we wait for defendants to prepare their case? The sooner defendants are informed of plaintiff's factual contentions, the sooner defense preparation can commence—and not before, obviously.

[fol. 1130] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF HEARING OF MOTION—Filed November 25, 1955

To: Raymond Del Tufo, Jr., Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Joseph E. McDowell, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Mathias F.

Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington 6, D. C. Richard W. Barrett, Esq., Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Bldg., Cincinnati, Ohio. Kenneth Royal, Esq., Dwight, Royal, Harris, Koegel & Caskey, 100 Broadway, New York 5, N. Y.

Sirs:

Please Take Notice that the undersigned will bring the within motion on for hearing before this Court at the Federal Building, Newark, New Jersey, on the 12th day of [fol. 1131] December, 1955, at 10:00 A.M. or such other time as the Court may order.

Dated November 25, 1955.

McCarter, English & Studer, Attorneys of Defendant The Association of American Soap and Glycerine Producers, Inc., 11 Commerce Street, Newark 2, New Jersey. By (S.) Augustus C. Studer, Jr., a Member of the Firm.

Of Counsel: Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C. By (S.) James T. Welch, a Member of the Firm.

[fol. 1132] In the United States District Court for the District of New Jersey

[Title omitted]

Motion for an Order Directing Disclosure of Grand Jury Transcripts—Filed November 25, 1955

The defendant, The Association of American Soap and Glycerine Producers, Inc. (hereinafter called "the Association"), respectfully moves the Court, pursuant to the discovery provisions of the Federal Rules of Civil Procedure and in accordance with the power of this Court to act in the interest of justice with respect to litigation pending before it, for an order granting leave to the Association

and its counsel to inspect and copy the following documents or papers which the Association believes to be either in the possession or control of plaintiff and its counsel or are otherwise within the control of this Court:

The transcripts of the testimony of all witnesses taken before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark from May 1951 to November 1952 in an investigation of possible antitrust law violations in the soap and synthetic detergent industry.

[fol. 1133] If the Court should be of the opinion that the entire transcript of testimony before the Grand Jury, together with the exhibits introduced in evidence, should not be made available to the defendant Association, then the Association prays for an order permitting it and counsel to inspect the testimony and pertinent exhibits before the Grand Jury of such witnesses as will give their consent to the defendant Association's seeing and examining their testimony.

In support of this motion, the Association shows to the Court:

(a) The transcripts of testimony before the Grand Jury as above set forth contained testimony taken in connection with an investigation to determine whether there were violations of the antitrust laws by the Association and other members of the soap and synthetic detergent industry.

(b) The Association asserts, on information and belief, that said transcripts and exhibits obtained by Grand Jury subpoena have been available to and used by the plaintiff in preparation for the instant civil action.

(c) The plaintiff has been permitted to retain and use in the preparation of the instant case documents and information of the Association produced in the Grand Jury proceedings. On information and belief, the Association asserts that the plaintiff has also been permitted to retain and use in the instant case all other documents and information produced in the Grand Jury proceedings.

(d) On the other hand, the Association has not had access to the Grand Jury transcripts or to other information produced before the Grand Jury.

(e) The said Grand Jury was discharged on November 25, 1952, without returning an indictment against the Asso-

ciation or the other defendants in this action and there is [fol. 1134] no pending criminal proceeding involving the evidence produced before the Grand Jury. The Association believes that the names of most, if not all, of the witnesses who appeared and testified before the said Grand Jury have been known for some time. It is believed that many, if not all, of the witnesses would have no objection to disclosure of their testimony.

(f) It is of the utmost importance to the Association that the information contained in the Grand Jury transcript be made available to it for the preparation of its defense in the instant case and that the testimony of many, if not all, of the witnesses before the Grand Jury as well as the documents introduced in evidence are relevant to the matters alleged in the complaint in the instant case. The relevancy of such transcripts in the instant case is supported by the fact that the plaintiff sought and obtained from the Association in this case the same records of the Association which were produced by it before the said Grand Jury.

(g) The Association believes that many matters pertinent to its defense in the instant case will never become known to it unless access to the Grand Jury transcripts is granted by this Court. Under the circumstances, as related herein, denial of such access would be unjust, discriminatory and prejudicial to the Association in the instant case and would be violative of the spirit of the applicable statutes and rules and would deprive the Association of due process and equal protection of the laws and would be, therefore, violative of Amendment V of the Constitution of the United States.

Dated November 25, 1955.

Mc Carter, English & Studer, Attorneys of Defendant The Association of American Soap and Glycerine Producers, Inc., 11 Commerce Street, Newark 2, New Jersey. By (S.) Augustus C. Studer, Jr. A member of the Firm.

[fol. 1135] Of Counsel: Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C. By (S.) James T. Welch. A Member of the Firm.

[fol. 1136] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF JAMES T. WELCH—Filed November 25, 1955

CITY OF WASHINGTON,

District of Columbia, ss:

JAMES T. WELCH, being duly sworn, deposes and says:

1. I am a member of the firm of Davies, Richberg, Tydings, Beebe & Landa, one of the attorneys for the defendant Association of American Soap and Glycerine Producers, Inc. (hereinafter called the Association), and am fully familiar with the proceedings heretofore had in the above entitled action.

2. The facts stated in the attached motion by the Association for an order directing disclosure of Grand Jury transcriptions are true to the best of my knowledge, information and belief. Many of them are matters of record [fol. 1137] in this case.

3. No previous application for the same or similar relief to that sort herein has been made by the Association.

James T. Welch.

Sworn to before me this 22nd day of November, 1955.

Elizabeth Dowty, Notary Public. (Seal.)

Notary Public, D. C. My Commission Expires December 31, 1958.

[fols. 1138-1139] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MEMORANDUM IN LIEU OF BRIEF IN SUPPORT OF MOTION FOR AN ORDER DIRECTING DISCLOSURE OF GRAND JURY TRANSCRIPTS—filed November 25, 1955.

Counsel for each of the three corporate defendants announced in open Court on November 14, 1955, that they

would file briefs in support of motions similar to the motion filed on behalf of the defendant, Association of American Soap and Glycerine Producers, Inc. In view of the fact that there will be three briefs before the Court on the question whether all of the transcript of testimony before the Grand Jury or the transcript of testimony of such witnesses as may give their consent, it seems useless to burden the Court with a fourth brief. We therefore state, that we rely on briefs filed by the three corporate defendants in support of the motion of the defendant association.

Respectfully submitted, McCarter, English & Studer, Attorneys of Defendant the Association of American Soap and Glycerine Producers, Inc., 11 Commerce Street, Newark, New Jersey. (S.) By Augustus C. Studer, Jr., A Member of the Firm.

Of Counsel, Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C.
(S.) By James T. Welch, A Member of the Firm.

[fols. 1139a-1143] Acknowledgment of Service (omitted in printing)

[File endorsement omitted]

[fol. 1144] In United States District Court for the District of New Jersey

United States of America, Plaintiff,

v.

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company and The Association of American Soap and Glycerine Producers, Inc., Defendants.

Notice of Motion and Motion—filed November 28, 1955.

Sirs:

Please take notice that the undersigned will move this Court in the United States Court House, Newark, New Jersey, on the 12th day of December, 1955 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, upon all the proceedings heretofore had herein, for an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure directing disclosure to the defendant Colgate-Palmolive Company of the transcripts of the testimony of all witnesses who testified before the grand jury of this Court sitting in Newark, New Jersey, from May 1951 through November 25, 1952 in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industries, and permitting the said defendant to inspect and copy the transcripts of such testimony, and for such other relief as may to the Court seem just and proper.

Dated: November 28, 1955.

Yours, etc., O'Mara, Schumann, Davis & Lynch, By Edward J. O'Mara, A member of said firm, No. 1 Exchange Place, Jersey City 2, New Jersey; Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York, Attorneys for Defendant, Colgate-Palmolive Company.

[fol. 1145-1146]

To: Honorable Raymond Del Tufo, Jr., United States Attorney, Newark 1, New Jersey. Honorable Joseph E. McDowell, Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Messrs. Arnold, Fortas & Porter, 1229 Nineteenth Street, N.W., Washington 6, D. C. Messrs. Bailey, Schenck & Bennett, 744 Broad Street, Newark, New Jersey. Messrs. Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C. Messrs. McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey. Messrs. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York. Messrs. Dinsmore, Shohl, Sawyer & Dinsmore, Union Central Building, Cincinnati, Ohio. Messrs. Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey.

[fol. 1146a] [File endorsement omitted]

[fol. 1147] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION FOR DISCLOSURE OF WITNESSES APPEARING BEFORE GRAND JURY AND TRANSCRIPT OF THEIR TESTIMONY—Filed November 29, 1955.

The Defendant Lever Brothers Company respectfully moves the Court for an order.

A. Requiring the plaintiff to disclose to said defendant the names of the witnesses appearing before the grand jury of the United States District Court for the District of New Jersey sitting in Newark from May 1951 to November 1952, investigating possible antitrust law violations in the soap and synthetic detergent industry (proceeding numbered Criminal 174-51, 175-51, 176-51, 177-51), and

B. Requiring the plaintiff to permit defendant to inspect and copy the grand jury transcript of the testimony of such

witnesses or, in the alternative, of such witnesses appearing before such grand jury as consent to the disclosure of their testimony.

The grounds for this motion are that (1) no privilege of secrecy attaches to the testimony of a witness before the grand jury; (2) Lever Brothers Company is urgently in need of access to such testimony in order to discover in this [fol. 1148-1149] civil proceeding the evidentiary basis, if any, for the charges in the complaint and to prepare its defense to such charges; and (3) no practicable alternative to such discovery exists under the Federal Rules of Civil Procedure because to attempt to obtain such discovery through depositions of such witnesses would necessarily involve substantial cost and severe inconvenience to all parties, would gravely retard the expeditious preparation of this cause for trial, and would not in any event produce accurate information because of the lapse of time and other factors.

Respectfully submitted, Bailey, Schenck & Bennett, by Alexander T. Schenck, 744 Broad Street, Newark, New Jersey. Arnold, Fortas & Porter by Mr. Fortas, 1229 19th Street, N.W. Washington, D. C. Attorneys for Defendant.

Dated: November 28, 1955.

Certificate of Service (omitted in printing)

[fols. 1149a-1251] [File endorsement omitted]

[fol. 1252] In United States District Court, District of New Jersey

[Title omitted]

Newark, New Jersey,
December 12, 1955.

Transcript of Hearing on Defendant's Motions for Disclosure of Grand Jury Transcripts—Filed December 29, 1955

Before The Honorable Alfred E. Modarelli, U.S.D.J.

Appearances:

Raymond Del Tufo, Jr., U. S. Attorney, District of New Jersey, by George J. Rossi, Asst. U. S. Attorney; Joseph E. McDowell, Raymond M. Carlson, and Daniel H. Margolis, Attorneys, Department of Justice, Attorneys for the Plaintiff.

Toner, Crowley, Woelper & Vanderbilt, Attorneys for defendant Procter & Gamble Co., by John A. Ackerman; Dwight, Royall, Harris, Koegel & Caskey, of Counsel, by Kenneth C. Royall, H. Allen Lochner, and Eugene Rossides; Dinsmore, Shohl, Sawyer & Dinsmore, of Counsel, by Richard W. Barrett.

O'Mara, Schumann, Davis & Lynch, Attorneys for defendant Colgate-Palmolive-Peet Co.; Cahill, Gordon, Reindel & Ohl, of Counsel, by Mathias F. Correa and James B. Henry.

[fol. 1253] Bailey, Schenck & Bennett, Attorneys for defendant Lever Brothers Co.; Martin J. Pendergast, General Counsel, Lever Brothers Co.; Arnold, Fortas & Porter, of Counsel, by Abe Fortas and William E. McGovern.

McCarter, English & Studer, Attorneys for the defendant Association, by Augustus C. Studer, Jr.; Davis, Richberg, Tydings, Beebe & Landa, of Counsel, by Adrien F. Busick.

Statement by the Court

The Court: Gentlemen, before we start the arguments, I have the usual preliminary thoughts which I always get together in the hope that it will save us all time, you and

the Court, and focus the argument. I want to compliment you all on the briefs. They certainly are thorough and very carefully prepared. I wish I could always say that for lawyers.

Of course, you all realize that the motion is not without its special complex problem. Counsel should base their oral argument upon these comments, which are the result, as I said, of the excellent quality of the briefs. Especially interesting was Colgate's analysis relating to the Department of Justice's alleged misuse of the grand jury subpoena. Today's arguments by the defendants mainly should be a reply to the recent brief dated December 7, [fol. 1254] 1955, submitted by the plaintiff; and plaintiff's argument mainly should be a rebuttal of defendants' oral arguments. As a result I should have clearly defined areas of dispute.

We are concerned here with four separate motions by defendants for orders compelling the plaintiff to produce for inspection and copying the transcripts of the testimony of all the witnesses who appeared before the grand jury; or, in the alternative, apparently all defendants request the production of the transcripts of the so-called consenting witnesses.

Lever also requests the names of the witnesses, and the Association requests "exhibits." I think this is the first request made by the Association.

Unless counsel now are able to persuade me otherwise—and I am always open to conviction, gentlemen—I shall limit these motions to the request relating to the testimony of all witnesses, and if that is denied, the testimony of consenting witnesses.

Now, does Lever really need a list of the names of the witnesses?

As for the mysterious "exhibits" asked for by the Association, no defendant has made any argument relating to them.

The grand jury conducted hearings in this district from May, 1951, until November 25, 1952. It investigated [fol. 1255] possible criminal violations of the Federal antitrust laws, but returned no indictment. The civil complaint commencing this action was filed on December 11,

1952, less than three weeks after the grand jury finished its hearings, the Thanksgiving intervening.

I have reached tentative conclusions as to certain arguments, so now I suggest that counsel re-examine them in the light of the following comments.

First, Colgate's motion is under Rule 6(e) of the Federal Rules of Criminal Procedure and every brief discusses that rule. However, Criminal Rules 1 and 54(a)(1) expressly provide that the Criminal Rules govern the procedure in all criminal proceedings, with the exceptions stated in Rule 54, none of which applies, in my opinion, to this civil action. Thus my current view is that Rule 6(e) does not give me authority to grant these motions. However, the rule and the cases decided thereunder are pertinent to show the approach to the problem of the extent of grand jury secrecy in criminal cases.

Second, I suggest that no one refer either to Judge Learned Hand's or Judge Medina's famous remarks in the Garsson and Morgan cases. The remark of Judge Hand has been taken out of its context and, I believe, applied too broadly; also, the problem before him was not the same as the one I now have.
[fol. 1256] Judge Medina's remarks were made without the benefit of argument and he gave no reason for his decision.

The thorough briefs submitted on this motion have given me sufficient discussion and leads to discussions so I do not intend to decide this perplexing question upon the basis of those remarks, even though they were made by two outstandingly eminent Judges.

Third, I don't believe I can get any help from the cases where the courts refused to allow examination of the grand jury transcripts for the purpose of attacking the indictment. For example, in United States v. Violon the defendant's purpose was to prove the indictment was based upon insufficient evidence; in United States v. Gouled the purpose was to prove the grand jury considered illegal evidence; and one or both of these reasons were involved in United States v. Morse, United States v. Herzig, United States v. Oley, Shushan v. United States, United States v. Papaioanu and United States v. Amazon.

Also, United States v. Procter & Gamble Company,

Metzler v. United States, United States v. Cohen, United States v. Crolich involved special circumstances arising in the context of a criminal case. Moreover, in none of these criminal cases was the liberal discovery policy of the civil rules involved at all, nobody ever referred to them. Maybe they didn't have to, in those cases.

[fol. 1257] Fourth, the result of the General Motors case is pertinent, but didn't the court rely too much upon the Garsson and similar criminal cases?

Fifth, plaintiff's argument beginning at the bottom of page 19 of its December 7, 1955 brief appears to beg the question in that even assuming the legal correctness of that argument relating to the departmental regulation prohibiting disclosure of documents of a confidential character, the issue is whether the grand jury transcripts are of such a nature. Of course, if I decide that they are, then I would have to deny the motions.

Sixth, I will not consider the Darling case cited by the plaintiff unless I have a copy of the opinion. Of course, that goes for the Government's adversaries, too.

Now, I should like to put several questions to counsel. You need not write these. I have prepared copies of this and my plan is to give them to you and you will have time to read them over and digest them.

(1) Mr. McDowell, do you object to submitting a detailed affidavit stating exactly (a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff in-

[fol. 1258] tends to make of the transcripts during the trial.

(2) I would like all of defendants' counsel to tell me exactly how the production of grand jury transcripts would materially aid their trial preparation.

(3) What is the status of the Herzog case in which Mr. Justice Douglas wrote an opinion on a preliminary question? If the Supreme Court files an opinion on the merits, will it be helpful to me regarding this problem?

(4) Does Wigmore support defendants' contentions in that he concludes grand jury testimony only temporarily is privileged secret matter? Is that a fair conclusion based on his statement in Section 2362: "There remain

therefore, on principle, no cases at all in which after the grand jury's functions are ended, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue."

I shall not refer specially to each of the many arguments made by both sides. Instead I shall state what I believe is a summary of the arguments. It is very important for counsel to comment both upon its accuracy and its completeness, for to render the proper decision I prefer to have a workable, accurate, complete statement summarizing the arguments. Here is my summary, subject to correction:

"The general rule is that grand jury testimony is not [fol. 1259] subject to disclosure, but there are exceptions to that rule. The exceptions are based upon the desire of the courts to reach substantially just result in a case if the five reasons traditionally given for secrecy are not applicable to the facts involved. Now this Court is asked to add another exception, namely, when the plaintiff, United States has had access to and perhaps has used and will continue to use—of course, the affidavit will disclose the facts, if one is submitted by Mr. McDowell—will continue to use grand jury testimony to prepare its case prior to a civil trial, and perhaps will use that testimony during the trial, and that testimony relates to the same subject matter and the same parties involved in the civil action, for the purpose of discovery and use at the trial, the defendants have a right to inspect and copy that testimony—well, the idea of that is clear, that if the Government used it, has used it and intends to use it at trial, then do the defendants have the right to inspect that transcript, or that portion which the Government used—or do public policy and the enforcement of the criminal antitrust laws outweigh such an asserted right?

Finally—this is interesting and coincidental—there is now on trial in this very building the case of the United States of America v. Grumstein, et al. It involves the Federal Government's attempt to recover damages from a [fol. 1260] meat packing company for alleged fraudulent sales of meat to the armed forces. In that case, on November 6, 1953, one of the defendants' interrogatories was:

"10. State whether plaintiff will use any testimony given before the grand jury in the criminal action involving the

corporate defendant and the defendant William Grunstein, and, if so, deliver a copy of the same to the defendants or make available such testimony for inspection by the defendants.'

It is close enough to our question to be very interesting. As a result of that interrogatory Judge Hartshorne now has before him—on reserved decision—a question similar to the one now before me. However, in that case the defendants do no seek carte blanche authorization for a random examination of the grand jury minutes resulting in the indictment against the present defendants in the civil suit; and the request for discovery is limited to those portions of the minutes which plaintiff plans to use at the trial for certain purposes indicated to the Court. Judge Hartshorne will probably file a written opinion, so I suggest counsel carefully consider its applicability to this motion and perhaps submit supplemental briefs on the specific question that was raised in Grunstein, where they directly asked, specifically, for the portions of the transcripts they [fol. 1261] wanted, not an overall inspection of the entire transcript, they specified what they want. And it has been argued before Judge Hartshorne. He reserved decision, and I had hoped that he would have it decided by now, but I guess he is having his troubles with the question, too. So I guess we will all admit that the question is not without great difficulties, and particularly on consideration of public policy.

Of course, I realize that you can't copy all this down, so I prepared copies of it, and I thought I would give one to each of the counsel. And I will take a recess. You go over it and make your own notes; and then we will come back and I will hear argument.

My only purpose is this, gentlemen—I don't want you to think that I want to limit you unnecessarily—but I feel that, if I can save your time and mine, and pinpoint the argument, that that is the desirable thing to do.

Mr. Cooney will distribute the copies of my memorandum. Then we shall take a recess.

Mr. Studer.

Mr. Studer: If your Honor please, before you leave, as you know, we represent one of the defendants in this case, the Association of American Soap & Glycerine

Producers, Incorporated. We are associated with the Washington firm of Davies, Richberg, Tydings, Beebe & Landa. Mr. Adrien F. Busick of that firm is here and I [fol. 1262] would like to move his admission pro hac vice in this case. He is admitted in all the circuits but one of the country, and the Supreme Court. He is a member of the District of Columbia Bar and the Virginia Bar.

The Court: The motion is granted, sir. We shall be pleased to hear from you, too.

Mr. Stader: Thank you.

The Court: All right. Now don't rush through it—analyze it, digest it. And I would like to hear your comments on my thoughts, too, in the matter. You may agree with me, you may not. But I assure you I will hear you. My mind is not foreclosed on the question.

(Short recess.)

The Court: Mr. Correa.

STATEMENT BY MR. CORREA

Mr. Correa: If your Honor please, we have examined with care your Honor's comments, and I shall try to frame my argument so as to utilize to the maximum extent the very real help which they constitute to our dealing with this question.

Now, if the Court please, let me approach the problem first by reference to this matter of Rule 6(e). It is true that our motion—and I speak, as your Honor knows, for Colgate—is based upon Rule 6(e) of the Rules of Criminal Procedure. It may be, as your Honor suggests, that in view of the wording of Rule 1 and 54 that Rule 6(e) is not [fol. 1262a] available. I don't believe it is a very important question, frankly, because I think to a large extent Rule 6(e) does no more than reflect what was the pre-existing law, in any event, applicable to this question. Further, of course, as your Honor knows, there is, in any event, no lack of power in the Court sitting on the civil side, under Rule 34 and Rule 26—rules relating to subpoenas and to interrogatories—to deal fully with this problem under those powers.

Now, 6(e) is helpful to us, though, because it does furnish in convenient form what I believe is substantially a codi-

fication of the pre-existing law. And that rule, as your Honor recalls, says that a juror, an attorney, an interpreter or a stenographer may disclose matters occuring before the grand jury—and I paraphrase—"only when so directed by the Court preliminary to or in connection with a judicial proceeding."

Now, the test or criterion which the courts appear uniformly to have used in determining whether or not disclosure should be made of grand jury minutes in connection with a judicial proceeding is a rather broadly worded one. Indeed, your Honor's own words in this little memorandum correspond—or embody it substantially in the words in which it usually is expressed—where your Honor speaks of the desire of courts to "reach a substantially just result." [fol. 1263] The interests of justice, in short, is the manner in which the courts have stated the criterion by which the determination is made as to whether or not grand jury minutes shall be made available.

And your Honor has in mind that this test, for example, is worded almost precisely that way in United States v. Socony-Vacuum Company as the statement of the Supreme Court on the subject. And also it appears from these various authorities in which this test is set forth, or adverted to, that the test is apparently more readily met, and more easily met, where, as here, the grand jury whose proceedings are under consideration has terminated, has discharged its function and has itself been discharged.

Now, I think that is an important point because your Honor will find in the Socony-Vacuum case, in the Rose case, in Metzler—in any number of the cases on this subject the courts emphasize that—well, the grand jury has finished; it has terminated its function; it has ended its job.

Now, I want to mention briefly—or emphasize briefly—the words "in connection with a judicial proceeding," because they simply make clear again what I believe has always been the law, and that is that the grand jury minutes can be made available in any kind of proceeding where the interests of justice so require. It need not be a case or pro- [fol. 1264] ceeding which itself flows directly from the grand jury proceeding in question.

Now, a couple of cases have made that quite clear. The Bullock case, which, your Honor will recall, is a fairly

recent one—1952, District of Columbia case—and there the grand jury minutes, or part of them, were wanted for the purpose of a proceeding having to do with the status of a police inspector.

Another case is In re Grand Jury Proceedings, Judge Kirkpatrick in the Eastern or Middle District—Eastern District, I think—of Pennsylvania, and there the grand jury transcript was needed in connection with the determination of an application for a beer permit. In point of fact, In re Grand Jury Proceedings goes rather farther than most of the cases with which we have dealt in our briefs and argument because there, as your Honor may have noted, the court permitted access to the grand jury minutes while the grand jury was still continuing in session. And the Court said—and your Honor will note that this case is well before Rule 6(e) or the Rules for Criminal Procedure—and the Court said, referring to the general rule, that where it is in the interests of justice that this should be done it will be done even though the grand jury itself was continuing in session.

Now, that leaves us—or faces us with the problem: What [fol. 1265] are the interests of justice, in general—if one can generalize on the subject—and, in particular, as applied to the situation in our own case, in the case at bar?

Now, as Mr. Justice Douglas pointed out in that Herzog case, there is in all these cases some element of conflict. He called it a conflict between the policy of requiring secrecy of grand jury minutes on the one hand and that policy which, as he put it, seeks to leave no stone unturned in seeking justice in a particular case.

Now, one of the tests which has to do with the policy favoring secrecy, and its applicability in any particular situation, is the five part test, suggested originally in United States v. Amazon Industrial Chemical Corporation, and adopted by the Court of Appeals for this Circuit in United States v. Rose. And I have in mind that your Honor has asked us to address ourselves specifically to that test and its five specific parts. I have it set forth—I think conveniently, if your Honor please—at page 7 of our memorandum, and that might be a convenient place from which to follow it.

Now, I want to say one thing about this statement in this case, if the Court please, because I think it is only after

we have studied this case, and the related cases, that it becomes clear that the exception to the rule which is stated in [fol. 1266] the paragraph next succeeding the paragraph in which these five reasons for the rule of secrecy are stated —the exception is an overriding one. In other words, the exception, as I read these cases—that is, the exception being that the rule is not observed when its strict application will defeat the ends of justice—that exception, I take it, would apply even though all—one, or more, or all of the five reasons for the rule were present. I think that is an important point because although we feel—and I think we can demonstrate—that none of these five reasons is here pertinent to the situation in the case at bar, nevertheless, it seems to me that correctly analyzed these cases do not require that showing. I think it is helpful that we are able to make it, but I did not, in making it, wish to be understood as seeming to suggest that, in my view, it was essential under the rule of the Rose case to do that.

Now, turning to these five tests, or the five parts of a test —and they are not really a test, that is perhaps a misnomer —what they are, are reasons favoring secrecy attendant upon grand jury proceedings. And the first one, of course, has no applicability here, that is obvious. The second one equally has no applicability.

Now, the Government makes in its memorandum a very finely spun argument in which they seek to contend that [fol. 1267] the second of these reasons would be applicable to this case. And they do that by emphasizing the first clause there, which reads, "to insure the utmost freedom to the grand jury in its deliberations" and forgetting about the balance of that reason, which reads, "and to prevent persons subject to indictment or their friends from importuning the grand jurors" because when the thing is read in its entirety it is clear that this reason relates to a time when the grand jury is actually in session, and that the main purpose of this is to keep grand jurors from being bothered by prospective defendants, and, as it says, their friends or relatives.

The Court: Off the record.

(Discussion off the record.)

Mr. Correa: But the main part is that these two have to do with a time when the grand jury is actually functioning, when it is in session.

The Court: And considering the matter.

Mr. Correa: And considering the matter, precisely—very importantly.

Third, to prevent subornation of perjury, or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it.

Well, there has been no claim or suggestion made that [fol. 1268] that is pertinent here.

Fourth, to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes. Let me come back to that one, because there is a very definite claim made that that is pertinent here.

And, five, to protect an innocent accused, who is exonerated, from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Well, as to this one, I don't think that is particularly applicable to this case. There is no claim made that it is, although—and I must mention this, in all candor—at page 11 of the Government's brief we find that the Government suggests that this may be involved here—and I emphasize the word "may" because it doesn't seem to me that this is a matter on which they need to argue "may", they must know—and I suspect they know—that it isn't involved. But if you note at the top of page 11 there, the first paragraph ending on that page, where this argument is made, I underlined in my copy the word "may", and it occurs three times in the course of as many sentences in that paragraph.

Now, I don't think that is an argument which warrants being taken seriously because I feel sure that if there were [fol. 1269] anything to the suggestion it would be made in more affirmative terms than that it "may" be involved. And I am not going to spend any time on that point.

Now, I should like, if your Honor please, to go back to four, because that one is seriously suggested by the Government as a point that is involved in the question as to the grand jury minutes here. Now, the short answer to four is that, like the reasons that precede it, four applies only

during the pendency of the grand jury proceeding itself. In other words, what four is talking about is the privilege of a witness before the grand jury. And there is no question—and as Wigmore points out—a witness before a grand jury does have a privilege in respect of the testimony which he gives to the grand jury, and that privilege lasts only so long as the pendency of the grand jury proceeding.

Now, that is the point of Section 2362 of Wigmore, which your Honor referred to in your memorandum, and which, I may say, we find referred to by the Supreme Court in the Socony-Vacuum case as being the authority on this question of confidentiality of grand jury minutes, because it is in that connection that the Supreme Court cites and relies on that very section of Wigmore, and that deals, as your Honor knows, with the privilege of a witness. And, as Wigmore points out, it would be undesirable if the witness's privilege [fol. 1270] did last beyond the grand jury session in which he is a witness because that would be a temptation to those so minded to testify falsely in the confidence that their false testimony could never be revealed. That is the point that, your Honor will recall, Wigmore makes concerning this.

So that when we analyze these reasons I think the thing that becomes immediately apparent is that they show why it is that so many courts dealing with this question emphasize that the grand jury is finished, that it has been discharged, that it has performed its function, and that the session is over, that there is nothing pending before the grand jury, that it has done its work. Practically every one of these cases mentions that element as an important element in the consideration of this question.

Now, so much if I may, for the negative side—if I may call it that—of this question, because it is with that that U. S. v. Rose deals in the paragraph we have been considering. And in the next paragraph, where they talk of the ends of justice, U. S. v. Rose—or the court in that case—is considering, or is stating the positive side of the rule.

Now, it is always difficult, I suppose—or appears on the surface difficult to give content, specific content, to such an expression as "where required by the ends of justice." That sounds to be a most literate generalization and could [fol. 1271] cover, one might suppose, almost anything; but not so in this case, if I may suggest it, because in this case

we are dealing with the question of: What is justice, for the purposes of this test, in a federal civil lawsuit? And we don't have to grope around among—like Diogenes with his lantern, loking for an honest man—we don't have to grope around among generalities, we have a set of rules. In short, the Supreme Court, acting pursuant to the direction and authorization of Congress, has laid down the rules, the criteria, for the administration, precisely, of justice in civil litigation.

Now, I may say parenthetically, your Honor, I think sometimes prosecutors—and I must confess that I probably had that view myself in my own day—get the notion that when you talk about justice you must be talking about something on the criminal side of the court because that is where the word "justice" becomes appropriate in relation to judicial proceedings. Of course, we know that is not so. Justice is just as much at issue on the civil side. And the rules are not designed simply to expedite litigation or to ease the administrative burden of the court, they are designed to accomplish the main objective with which all lawyers and all judges in all courts are concerned, and that is the achievement of justice.

The Court: Yes, that is in Rule 1 of the Federal Rules of Civil Procedure.

[fol. 1272] Mr. Correa: Precisely, your Honor.

The Court: The first rule.

Mr. Correa: And there is a basic principle to these rules, and that is of the fullest possible disclosure on both sides of the case. I remember, and I am sure your Honor does, when—in fact, with some of my younger associates I sometimes date myself because I still refer to these as "the new rules", and they were promulgated in '38, and I am reminded that they are not so new any more—but I remember back before '38, in the 30s we had a great deal of stockholder litigation and these plaintiffs would sue in the state court in New York, because they could get a fairly broad examination before trial, and the trick was to file a complaint and sue, and then notice the president or the chairman of the board of a large corporation and get him down to a Special Term and pretty soon the company would settle to avoid that inconvenience and bother. So we all became very great experts on the law of removal

because these companies were usually Delaware corporations and plaintiffs were generally from some other state, or from New York State, and if we could remove the case to the Federal Court then you didn't have to worry about examination before trial because in the Federal Court there wasn't any—you simply couldn't get an examination before trial except on a de bene esse basis.

[fol. 1273] Now, I mention that because it underlines the tremendous extent to which these rules lay down a new policy. I mean this isn't just some gradual policy which has crept into the rules by building up over the years, this was a definite decision by the Supreme Court that the old policy was not good and that there should be a new policy which would favor the fullest possible discovery in federal civil litigation. And I don't need to tell your Honor. Anybody who practices in the federal courts knows to what extent that has gone. But whether we approve of it, or disapprove of it, like it or don't like it, the fact is that that is the basis which the Supreme Court in its wisdom has said is the sound basis for the achievement of justice in federal civil litigation.

The Court: And like all good rules it can be abused, plenty.

Mr. Correa: It can be, if your Honor please, there is no question about it.

The Court: And has been, too.

Mr. Correa: And I am afraid it has to be said it has been abused. But the point is very clear that in civil litigation the principle for obtaining justice which the Supreme Court has not only approved, but laid down in the most emphatic terms, is a principle of the fullest possible discovery.

[fol. 1274] Now, let's apply that to this problem, because here we have the ingredient of the problem. The norm is stated as being when it is in the interests of justice. What is deemed by the Supreme Court to be in the interests of justice in civil litigation is equally clearly stated in the Rules of Civil Procedure—the fullest possible discovery. It would seem, if your Honor please, almost without more, that if the rules laid down by the Supreme Court are going to control this lawsuit that we ought to have full discovery of the minutes which we seek.

Now, I think that would probably be true in any event. But whether it would or not, it is true here for a special reason, and that reason is this. Your Honor said earlier—I don't find it in this memorandum, but I think it was in your Honor's remarks before you came to the memorandum—that we, Colgate, had said in substance that the Government had misused the grand jury process.

Well, with great respect, I am afraid we have not made our position entirely clear. We said they have used it. We prescind from the question of whether that is a misuse, or an abuse, or not, it is not material. The point is, they have used the grand jury proceeding, and the process of the grand jury, for the purposes of a civil case. They do that not only in this case but, as we have pointed out in our memorandum, as a matter of policy, in cases generally. [fol. 1275] Now, we are not here to argue that that is an abuse.

The Court: In fact, I heard Judge Barnes say that at a dinner meeting.

Mr. Correa: He said it many times, if your Honor please. And we are not here to argue that that is an abuse of process. If we were, we would be moving to suppress. And we are doing just the opposite. We are accepting that. But we are saying that if they want to use the grand jury as an adjunct to the preparation of civil cases, as a means of obtaining a pretrial discovery—because that is what it is, it is pretrial; pre-complaint, too; but discovery nonetheless—then they must be content to have it treated as any kind of pretrial discovery is treated under the Rules of Civil Procedure.

In other words, what we are saying to your Honor is we may be required—when I say "we" I mean the courts as well as litigants, like ourselves—we may be required, because of the practicalities of the matter, to concede that the Department of Justice has to use the grand jury to prepare civil cases—I say "we may be"—but if we must make that concession then let the rules and the policy governing the conduct of civil cases apply as well to the grand jury proceedings.

Now, that is not without reservation. It is subject, of [fol. 1276] course, to reservations that may be appropriate in other kinds of cases. But in this case—this case, as

your Honor will recall—because your Honor made a—perhaps "finding" is a more formal word than is warranted, but a statement concerning it in an opinion which your Honor wrote some time ago on a motion, I believe, of Procter & Gamble—but, as your Honor will recall, from the inception of this grand jury investigation the Department had it in mind that its event might be a civil proceeding—purely civil case. When they did file a civil complaint, in December of 1952, as we pointed out in our brief, they filed it with the statement—or press release, in point of fact—in which they said, "The filing of the complaint"—I am quoting the press release—"results from a careful and thorough investigation of the industry, including extensive grand jury proceedings."

Now, we have pointed out in our memorandum how just by referring to the ordinary procedures set up internally within the Department for the drafting, and the clearing and approval of complaints, and referring, as well, to the dates when, for example, Mr. Little, the then president of the Colgate-Palmolive Company testified, and the date when the grand jury was discharged, which was a few days later, and the date when the complaint was filed, which was two weeks, including, as your Honor pointed out, a [fol. 1277] Thanksgiving week-end holiday—simply by regarding those things it is perfectly patent on the face of the record that when at least certain of these witnesses testified—and I may be pardoned, having a certain interest in Mr. Little testifying, because he was president of my client, and is now chairman of the board—it is perfectly patent that when, for example, Mr. Little testified the Department had this civil complaint in course of preparation and, I would suggest, pretty well completed, going through the mill for approval, as seems quite clear, under their procedure, that is where it must have been. So that they knew that.

Now, I am not here to contend that it was a heinous thing, that they served a grand jury subpoena on Mr. Little when they knew that a civil complaint was what was going to come out of the investigation, when they had, so to speak, a civil complaint in their back pocket, unbeknownst to us, of course; all I am saying is that if they are to have that kind of discovery—because that is what

it is, it is sworn discovery, used in the process of the court—if they are to have that kind of discovery in a civil case, then their discovery should be subject to the same ground rules that apply to everybody else. The courts of this country increasingly are saying that to the Department of Justice in all kinds of cases, and especially [fol. 1278] in antitrust cases. And they are saying to the Department, "When you come into court as a civil plaintiff you have got to play the game according to the rules of the game as they are laid down for all litigants." That was the special pertinence of that Cotton Valley Operators case, which we cited to your Honor, which involved F.B.I. reports. And the Department didn't want to produce the F.B.I. reports, in fact, said they wouldn't produce them. And, of course, the court, on its separation of powers, did not deem that it had the duty—I mean that it had the power to compel the Department to produce the reports. "But," said the Court, "we don't have to give relief to any litigant, including the United States, who comes and defies our orders" and dismissed the complaint. That was affirmed by an equally divided Supreme Court, a four to four decision.

And there have been others. This Bowman case—which is not the same situation in the Supreme Court, at least—is another illustration of the trend of decisions in the courts of this country, including the Supreme Court itself, toward requiring the Government in civil litigation to abide by the ordinary principles and the ordinary rules which apply to any other litigant.

Now, those principles favor above all, as your Honor knows, discovery. They favor, as well, the elimination of surprise. They do not favor any device by which—[fol. 1279] because the Department has to use the grand jury proceeding, which happens to be an established form of proceeding on the criminal side of the court—they are able to come out, having obtained, in effect, a most extensive pretrial discovery, conducted wholly ex parte, and without having to disclose the product of that proceeding—even the product of it—to their adversary. It is as if there was some procedure by which we could go and take depositions ex parte, and tell the Government, "Well, we have got them, and you haven't, and that's it. If we are

going to use them, you will find out at the trial. That is a little element of surprise we have." And the rules were designed precisely, and in terms, to eliminate elements of surprise, including, we submit, any element which may be gained by the procedure followed here.

Now, if the Court please, the nature of the proceeding, in the sense of this grand jury proceeding—in the sense that it had always in view—the Department had always in view the possibility of a civil complaint coming out of it—in other words, they were working toward a civil complaint at all stages—is important when it is contrasted with another type of case, where a purely criminal investigation is conducted before the grand jury, and thereafter, after the grand jury is all finished, and has indicted or returned a "no bill", as the case may be, there is a [fol. 1280] civil case in which the Government finds it is incidentally the beneficiary of some information or evidence that has been gathered in the prior criminal investigation. That appears to have been the situation in the General Motors case which Judge Leahy decided.

Now, I think the General Motors case is wrong, in the sense that I think—and I rather gather that your Honor does, too—that Judge Leahy did not consider or, perhaps, did not have called to his attention all of the appropriate authorities. And I think, as we have pointed out in our memorandum, his opinion seems to rely very heavily on criminal cases involving efforts by defendants to open the grand jury minutes so that they can attack the indictment. And, of course, as your Honor has pointed out, those cases are simple not in point. There are reasons of policy there which have nothing whatever to do with our situation here.

Now, if the Court please, the Government's position here seems to be that these grand jury minutes are in some way privileged. I say "in some way privileged" because I believe I discern in their arguments at least two separate grounds of privilege—or maybe they are not separate, I don't know—but anyway, the contention of privilege is advanced. Now, they make one contention which is the [fol. 1281] work product privilege, as near as I can judge it from their brief. And about that I think only a word needs to be said.

You don't get any work product privilege where you are using the processes and procedures of the court. Work product privilege may apply, to be sure, if I go out, at great inconvenience and difficulty, to interview a witness, and make my notes of what he has to say, and what he will say, and my impression about him, and then bring it back to my office, and my opponent can't sit in his office and say, "Well, that's fine. I am glad you did that. Now I will just subpoena that and that will save me having to go see that fellow." That's work product, sure. But where the processes of the court are invoked, as here, then I think work product is simply not pertinent, it is not relevant. It's as if I were to say, "Well, I am taking a deposition, but I don't want the Government in attendance at the deposition, because, after all, the questions and the line I take with the witness will reflect a great deal of work on my part, and that is my work product, and they shouldn't be there. They can't have that." Having invoked the processes of the court for pretrial discovery, the principles of the rules take hold and my pretrial discovery has to be out in the open, so far as my opponent is concerned. And that is all we are suggesting ought to be binding on the Government here.

[fol. 1282] Now, the other privilege they seem to suggest is one that I must confess rather astonished me. The Government said, if I read their papers correctly, "Well, we hired the grand jury stenographer, and paid the grand jury stenographer out of our appropriation, and we have got the physical transcripts, the Court hasn't got them, and they, therefore, come under rules laid down by the Attorney General, applicable to records of the Department of Justice. And they are privileged under those rules and their disclosure cannot be compelled."

Now, it is just inconceivable to me—perhaps because I have listened too many times to courts charging grand juries and telling the grand jury that they were arms of the court, and have heard too often that reference made to believe that the grand jury is an arm of the court sort of tied behind its back by the Department of Justice. I just don't believe that is the law. I don't think that their cases have any applicability. Rule 6(e) would be meaningless, if there were anything to that suggestion,

because Rule 6(e) seems to put the matter in the control of the Court, the matter of disclosure of the minutes, and so do all these cases, including the criminal cases, in which courts have dealt with questions as to whether or not grand jury minutes should be disclosed. I know of not a single case in which the Court has indicated that any [fol. 1283] decision the Court may reach on that question is subject to some rule of the Department of Justice or of the Attorney General. I think that that argument simply has no support in the instant case, in authority, or, for that matter, in logic, with great respect to my learned friends.

The only other thing which the Government's memorandum does discuss is the cases. And your Honor's memorandum has pretty well disposed—certainly of the cases they principally rely on. They discuss the General Motors case. Your Honor, of course, has in mind that that antedated U. S. vs. Rose. I suspect had it come out after that the result would have been different.

Now, there is this dictum or statement of Judge Medina's. Well, I think your Honor has evaluated that for what it is worth. As it happens, I represented two of the defendants in that case before Judge Medina, including one so-called major one. And we weren't interested enough to try to get Judge Medina to hear argument on that motion with respect to the grand jury minutes. And I have no doubt whatever that he would at least have heard argument had all of us, or very many of us, or any of us pressed very seriously for it. But even Mr. Carson, who is quoted in the transcript which is set forth in the papers before your Honor, even he wasn't pressing very vigorously on [fol. 1284] that point. So that I don't think it can be taken as a decision which was very fully considered, or carefully considered, or even given very much thought.

Now, as to this Darling case in Minnesota, that is left in kind of an unsatisfactory way because apparently what the Government's brief reflects is an informal conference with the judge who presided there in chambers. Furthermore, it is difficult to see how much in point that case is since the application there was made by witnesses who had been before the grand jury, apparently not parties to the litigation. And I am not at all sure that the same considerations would apply to that question.

However, one of co-counsel has handed me a letter which they have received from one of the attorneys in the Darling case, which may add something to our meager store of information concerning that authority. And perhaps I might read that to your Honor.

Mr. Royall: The judge said he was going to disregard it.

Mr. Correa: It has been pointed out to me, if your Honor please, that your Honor said you would disregard the Darling case.

The Court: Well, it is not reported, is it?

Mr. Correa: It is not reported, and never will be. As I understand it, it has been dismissed, and there never will [fol. 1285] be any report of it. So that we have got some further information about it, but I don't know that that is any better in quality.

The Court: Unless somebody can show me why I should consider it and why it may be pertinent in deciding this motion. I have always been afraid of these unpublished decisions.

Mr. Correa: Well, as I understand it, Judge, this wasn't even a decision; it was simply a judge saying to a group of lawyers what he thought he was going to do about a motion pending before him. But then he never got to do it, because he was never called upon to do it. Now, that is the status of it. And I don't think that is a very high grade of authority. And I think perhaps it is best left out of consideration, because, as I say, there never will be any decision in the case, if we are correctly informed about its status.

Now, if the Court please, I have tried to answer in the course of my remarks all of the questions which your Honor has put. But there is one question which occurs to me that may perhaps be dealt with specifically. And I refer to page 3, question 2, on that page where your Honor says, and I quote, "I would like all of defendants' counsel to tell me exactly how production of the grand jury transcripts would materially aid their trial preparation." [fol. 1286] Now, if the Court please, the answer to that is apparent, once we appreciate what this grand jury proceeding consisted of. This grand jury proceeding, as the materials we have referred to show, was a pretrial, precomplaint discovery into the very questions, the very issues, which are posed by the pleadings herein; by the complaint.

The Court: Mr. Correa, if you consider that the grand jury was in the nature of pretrial discovery——

Mr. Correa: Which it was.

The Court: —by the plaintiff now—you don't have to answer that question.

Mr. Correa: I am not sure I got that. I am afraid I missed a word somewhere.

The Court: Well, I didn't know you were going to contend that the grand jury proceedings, looking toward an indictment, were going to be considered in the nature of a pretrial discovery proceeding by the plaintiff in this case.

Mr. Correa: But your Honor has said three very significant words in the statement you just made—"looking toward an indictment." That's a grand jury proceeding, and not a discovery proceeding, except in the generic se se, on the criminal side, but where you have a grand jury proceeding which is looking toward a civil complaint, as this one was, from its inception—to be sure, at the beginning, it will be contended—and we can't disprove it—that it was [fol. 1287] looking also toward an indictment. But the point is not that it was looking exclusively toward a civil complaint, it was looking toward a civil complaint, and it was that from the beginning. And I say that any proceeding which consists——

The Court: Could you establish that fact, do you think, that they never intended to get an indictment?

Mr. Correa: No, I don't have to establish that, if your Honor please. As I understand the law, all I have to establish is that whatever they intended, or didn't intend, about an indictment, from the very beginning they did intend the possibility of a civil suit, a civil complaint, based on the very evidence that they were getting from the witnesses before the grand jury. And that is exactly what happened.

So there are two points that are important. No. 1, at the beginning that is what they intended, not as a sole or exclusive intention, to be sure, but they intended it; and, No. 2, that is what came out at the other end of the proceeding.

Now, I say that if that isn't pretrial discovery, what is it? They discovered evidence. They used the evidence to base a civil complaint. That evidence has conditioned all their thinking, all their preparation that they are engaged in currently. And the Rules of Civil Procedure say that we should

[fol. 1288] be in the same position as our opponent with respect to any evidence which is a matter of record and obtained as such under the process and procedures of the court; and we are not.

Now, I don't mind—if your Honor please, let me emphasize that point again; this is the final point I make—I say again I don't mind their having this anomalous situation where they use the criminal process of the court, and the criminal procedures, the grand jury, in the aid of a civil case. We have crossed that. We are not challenging that. But I do say that they should not have, and the law does not contemplate that they should have, and it is contrary to the interests of justice—or in the words of the Rose case, it would defeat the ends of justice to permit them as a result of that anomalous situation to gain the very——

The Court: Unfair advantage over the defendants.

Mr. Correa: —the very kind of unfair advantage which the Supreme Court sought in 1938 to eliminate forever from federal civil litigation; yes, your Honor.

The Court: I knew you were going to say that sooner or later.

The Court: Mr. Busick.

STATEMENT BY MR. BUSICK

Mr. Busick: Your Honor, all I ask is for a short time to emphasize a few points and to respond to the memorandum which your Honor gave us this morning.

[fol. 1289] As a preliminary matter, it seems to me that to say that the general rule is that evidence before a grand jury is not to be disclosed is not an exact statement in view of what the Supreme Court said in the Socony-Vacuum case. This is quoted.

"After the grand jury's functions are ended disclosure is wholly proper when the ends of justice require it."

Therefore, it seems to me the general rule is that where the ends of justice require it, it will always be disclosed.

Now, in the subsequent case in the Supreme Court, the Bowman case—now, that was a criminal case under the Sherman law, it is true, but the court sustained a subpoena duces tecum which required the production of exhibits be-

fore the grand jury. And in connection with that the Court said this:

"There is no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury."

Now, counsel for the Government seeks to distinguish betwen exhibits and testimony. It seems to me there is no proper legal distinction. They are simply two classes of testimony adduced before the grand jury. He says that to reveal oral testimony might embarrass a witness. Well, it is [fol. 1290] just as true that a document produced by the witness could be just as embarrassing. So if you give access to the documents, by the same reasoning you give access to the oral testimony. It doesn't seem to me, your Honor, that there is any distinction there.

Now, this case would seem to be one where the principles, the policy of the Rules of Criminal Procedure might be applied, for this reason, your Honor. This is a case civil in form, it is true, but in fact it is a quasi-criminal matter. These defendants are charged with violating Section 1 and Section 2 of the Sherman law.

Now, a violation of those sections is a criminal offense. It is true the statute provides two methods of enforcing a law, one criminal and the other civil. But the substantive law is a criminal statute.

Now, for that reason it seems to me that the policy of the Rules of Criminal Procedure might be considered, your Honor, in determining whether or not we should have access to the testimony of witnesses before the grand jury.

Now, furthermore, your Honor, it seems to me, so far as counsel for the Association is concerned, that this motion doesn't have to be brought under any particular paragraph of the civil rules, or the criminal rules. The purpose of most of those rules is to permit one party to acquire through [fol. 1291] order of the court information in the hands of the other party.

We make this motion to your Honor to allow access to records in your jurisdiction, under your control. We are not asking you to make the Department of Justice do something. It may be that if your Honor thinks we should have that

testimony you will order the Department to produce it. But, nevertheless, that testimony is a part of the record in that proceeding and we are entitled to have it.

Now, I am not certain—your Honor, in his memorandum, refers to the contention of the Government that this testimony really is confidential documents of the Department and therefore they cannot be disclosed, under the decisions. Now, its principal reliance, I assume, from his brief, is on this statute:

". . . the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the Government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function."

Now, what that statute does, and the only thing it does, is to make it lawful for a stenographer to be in the room. [fol. 1292] There is nothing in the world in that statute, to my mind, your Honor, that can be construed as saying that the transcript of the testimony is not under the control of this Court for all time. It can't be a confidential document in the possession of the Department of Justice. For centuries the records of the grand jury have been a part of the records of the court to which the grand jury was attached. I doubt very seriously whether Congress, if it wanted to, could transfer the records of the grand jury generally to the Department of Justice and put them under their control.

All the functions of the Federal Government under the Constitution are enjoyed by the three coordinate branches. For hundreds of years the grand jury and its proceedings have been a part of the judiciary and the judicial branch of the Government. They are part of the judicial branch of the Government today. And I don't think it would be constitutional for Congress to transfer them to the executive branch of the Government. They have no place there.

Now, your Honor, coming to your memorandum, you say, "I would like all of defendants' counsel to tell me exactly how production of the grand jury transcripts would materially aid their trial preparation."

Well, now, if your Honor please, I think that the Associ- [fol. 1293] ation is more in the dark as to what they are

charged with in this case than any one of the defendants. This is a printed copy of the complaint. In that complaint under paragraph 34 there are 13 paragraphs and under paragraph 34(b) there are 11 paragraphs distinctly alleging that the three corporations have done certain things. Now, it is followed by this allegation, "The defendant Association has assisted the other defendants in doing the things described in subparagraphs 34(a) and 34(b)." That is all the information we got of what we did.

The Court: Well, you are certainly entitled to know how you assisted, I grant you that.

Mr. Busick: I beg your pardon.

The Court: You are entitled to know how they claim you assisted.

Mr. Busick: What I was coming to is this, your Honor. Of course, we will exhaust our remedies under the Rules of Civil Procedure. But there is nothing that will give us the picture of this case like being able to read the transcript of the testimony before that grand jury.

Not only that, your Honor says the Government designates what it is going to use. Well, that means we can work up a defense for that. But how about testimony of what is favorable to us. He isn't going to give us that, because he isn't going to use it.

[fol. 1294] The Court: I don't know how fair the Government is going to be about it. They might give it to you.

Mr. Busick: Your Honor said to give them what they are going to use. So that I say that nothing will give us, the Association, the picture of the case against us. Now, the Government at this minute probably knows every particle of evidence they are going to introduce on the whole theory of connecting us with an alleged conspiracy and we know nothing of it.

Now, we can get, at best, fuller—have a better understanding of it from the minutes of that grand jury proceeding, from the testimony, than any other way.

And in conclusion, I think your Honor has a perfect, complete power under the two decisions which I have cited to say to us that we can see that transcript. And you would be doing what the Supreme Court said is perfectly proper to do.

Thank you.

The Court: Well, suppose they told you who testified in the grand jury that you assisted, couldn't you take their deposition?

Mr. Busick: I assume we could take their depositions, if we knew who they were. Personally, the Association doesn't know who the witnesses were.

The Court: It does not?

[fol. 1295] Mr. Busick: No, sir; we have no information on it. I know a few of them because it called for some persons from the Association. They got our documents, they returned them, and they will designate the ones they are going to use. But that will just give us an idea of what they are going to do. But what are they going to prove against us, and how are they going to prove it? I think, your Honor, we are entitled to know from that general allegation just how we are supposed to have assisted in any alleged conspiracy. Thank you.

The Court: Gentlemen, it is ten minutes of one. I generally adjourn for lunch at a quarter of one. It will be difficult enough, to get back here at 2 if we adjourn now. Try to get back at 2; please.

(Noon Recess.)

[fol. 1296] AFTERNOON SESSION

The Court: Mr. Fortas.

STATEMENT BY MR. FORTAS

Mr. Fortas: May it please the Court: Your Honor, in common with other counsel, I have a sense of great responsibility in discussing the question that is before you. I realize, as your Honor has recognized in the statement that he made this morning, that this is a question of great importance.

We are asking your Honor to make a ruling in this case, to grant our motions in this case to give us access to the transcript of the testimony of witnesses before the grand jury. In making that motion we are asking your Honor to make a ruling that is without precise precedent.

In other phases of this case your Honor has demonstrated that he is willing to deal with the problems of this

Big Case and to deal with them on their merits and squarely in the interests of justice and in the interests of an efficient and effective trial of a Big Case. I speak for myself, and I believe that I reflect the views of counsel who represent the other defendants, in any event, when I say that to date the results of that approach by your Honor have been excellent and I believe that we are on our way to establishing some useful procedure in connection with these vexatious Big Cases.

[fol. 1297] Now, we have before us today a problem that in terms of magnitude and in terms of its importance to the administration of the Big Case is at least as important as the documentary problems with which this Court has heretofore been concerned, and as to which this Court has heretofore devised—invented, I may say—procedures which are novel, which are sound, and which I believe will be discussed for many years to come.

I have said that these motions that are before your Honor now present a new question. And they do. The nearest thing is the decision of Judge Carter in the Standard Oil case in California—I withdraw that; perhaps I shouldn't say "decision"—the opinion that Judge Carter expressed at the pretrial conference when he allowed access to the testimony of those witnesses before the grand jury who consented. Apart from that all of the other cases on the books are different in one respect or another. And I shall not delay to talk about those differences.

So that I repeat, we are presenting to your Honor, substantially speaking, a new question and are respectfully asking your Honor to bring to bear upon this new question, so tremendously important in the administration of justice, so tremendously important in the handling of Big Cases—we are asking your Honor to bring to bear upon that the same qualities that have led to the prior administrative [fol. 1298] decisions in this case.

It is in that spirit, your Honor, that we have attempted to brief this case, in the spirit of trying to be of the greatest possible assistance to the Court.

The problem that is before your Honor is one that is simple of statement, even if difficult of resolution. On the one hand there is a tradition, a tradition that grand jury proceedings are secret.

I state it in that broad fashion because it is the statement of a virtue, of a value, of an abstract principle, if you please. But it is a principle that has to be examined very closely and very carefully for the purpose of arriving at a decision in any particular situation.

The grand jury proceedings have been protected in order to preserve and protect the objective of grand juries. The usual objective of a grand jury is to consider whether there is probable cause in an allegedly criminal situation and to consider whether it will indict or will not indict.

Your Honor's experience is such that I am sure he fully realizes that that is the context in which this abstract generalization about the secrecy of grand juries has arisen. Even in that narrow context of the ordinary, run of the mill criminal proceedings where the question is to indict or not to indict, even in that narrow context there are many situations in which the grand jury proceedings are not secret. There is, for example, the case in which by [fol. 1299] evidence outside of the grand jury proceeding the defense charges that there was no probable cause, or that there was something improper before the grand jury. There is the case in which a witness before a grand jury is charged with having perjured himself before the grand jury. That is the United States against Rose case in this circuit and the Remington case in the Second Circuit. There are a good many decisions in which grand jury transcripts, even in these limited proceedings, the ordinary, run of the mine criminal proceedings, have been opened up for purposes of libel proceedings, and so on, every case, every situation, being looked at under a microscope, as is the custom in our system of justice.

So that even in the narrow context in which this general principle leads up to say; "Yes, grand jury proceedings are secret"—even in the narrow context in which that expression has arisen, and to which it is applicable, there are many exceptions where the ends of justice require it.

Now we come to the situation of the Big Case. We come to the situation of a civil antitrust proceeding which followed an investigation before a grand jury. The investigation having been completed, the grand jury having been discharged without returning an indictment—the grand jury, in other words, being functus officio, its

[fol. 1300] function being ended, having long been ended—its function in this narrow sense of whether to retain an indictment or not possibly never having existed, but even if it did exist, even if that was actually a question here, even if the grand jury was not used solely for purposes of a civil investigation, even in those circumstances it is notable that the present situation also involves the element that no indictment was returned. So I suggest to your Honor that we are far outside—far outside of the context in which the general principle that grand jury proceedings are secret was born and in the context of which that general principle is usually repeated.

Now, what do we have here, what precisely are the values with which we are here concerned, what are the factors on the one side and on the other side, what is the precise situation?

Your Honor, let me start—I hope I may start—with this proposition, to recapitulate. Grand jury proceedings are secret. But what proceedings; in what respects; upon what occasions; what parts of the grand jury proceedings?

Now, those, I think, are the key questions and I think that what I am about to say will develop them. Let me first start with clearing away one very simple proposition. We are not here concerned with the grand jury proceed-[fol. 1301] ings as a whole. We are not asking for access to grand jury proceedings as a whole. We are here speaking only of the transcript of the testimony of witnesses who were called before the grand jury. That is all we are concerned with here. All of the cases, all of the learning, all of the lore with respect to the secrecy of grand jury deliberations, of the way the grand jurors voted, of what was said by them, or among them, all of that lore is beside the point. Our motions are addressed solely to the testimony of witnesses who appeared and testified before the grand jury.

Now, as to the testimony of those witnesses, is that testimony secret, is that testimony part of what the law has in mind, so to speak, when it says that grand jury proceedings are secret? The answer to that, your Honor, if I may respectfully say so, is clearly and unequivocally no, as a general rule, subject to very limited exceptions.

Now, Rule 6(a) of the Criminal Rules of Procedure, as Mr. Correa indicated, is to a large extent merely a codification of the existing law at the time. But Rule 6(a) makes it clear beyond any dispute that a witness before a grand jury cannot be sworn to secrecy. Rule 6(a) says that no persons other than those specifically enumerated—the jurors, the attorneys, the clerks, and so on—no person other than those may be sworn to secrecy. Witnesses who [fol. 1302] appear before a grand jury are free, if they choose, to go outside and to tell what they said to the grand jury. Of that there is no doubt.

So I respectfully submit to your Honor that this general statement—which we all cherish, properly understood—that grand jury proceedings are secret, clearly does not apply to the witness. The witness cannot be sworn to secrecy. The witness may disclose what he said. The only aspect of secrecy that attaches to a witness's testimony seems to me this, that with some exceptions the witness cannot be compelled to testify as to what he said before the grand jury while the grand jury is still in session. After the grand jury is discharged the witness may, in appropriate circumstances, be compelled to testify.

But I want to make it very clear, your Honor, that there is this fundamental distinction that is drawn in the cases, and in Rule 6(e), between the grand jurors themselves, their attorneys and assistants, on the one hand, and the testimony of witnesses. We are not here dealing with an aspect of what goes on before the grand jury—that is, within the limits, or within the borders, within the scope of that general principle of law that, I repeat, we all believe in, that grand jury proceedings are secret.

With that background let's see just what we have here. We are talking only about what the witnesses testified to [fol. 1303] before the grand jury. Is it the Government's position that that testimony is secret, that that testimony cannot be disclosed? Is that the value that they are trying to protect here?

Well, in the first place, that isn't true. As I have just stated, Rule 6(e) leaves the witnesses entirely free to say what they said before the grand jury. There is no cloak of secrecy with respect to the witnesses' testimony. What is

the value then that the Government is trying to protect here; what is it?

The testimony of witnesses is all that we seek. They say that it is secret. They say that the testimony of witnesses has to be protected from disclosure.

But is that really what they are saying? We all know that it is not what they are saying, for this reason. In the first place, they have used that testimony themselves as part of their preparation of the case. That is clear from the statement of issues and from common knowledge.

In the second place, they will use the testimony of those witnesses in public, your Honor, on a public record, your Honor, in the trial of this case. And Mr. McDowell, in response to your Honor's question No. 1, is not going to tell you that the Government will not use portions of the testimony of these witnesses. They are going to use [fol. 1304] it for the purpose of impeaching witnesses; they are going to use it primarily for what is whimsically called by us lawyers "refreshing the witness's recollection."

If your Honor please, if the testimony of witnesses is going to be used by the Government in the trial of this case, can the Government, if it thinks about this, and if it presents its case with customary candor—can the Government say to your Honor, "We consider the testimony of witnesses before a grand jury to be secret and sacrosanct so that it must not be disclosed to anybody?"

To me that just doesn't add up. That is to say, it seems to me that the Government has a choice. The Government can take the position that the testimony of witnesses before the grand jury in a case of this sort is secret. In that event they would not use that testimony as part of the preparation of their case, except possibly to the extent that it stuck in their minds; certainly they would not use that testimony at the trial of the case for purposes of refreshing the witnesses' recollection or for purposes of impeachment.

I am afraid, your Honor, that, upon analysis, what has happened here is that inadvertently a general principle, that grand jury proceedings are secret, has become distorted by the Government to its use as an instrument of Government trial tactics.

[fol. 1305] Now, I realize the seriousness of that statement. I am not saying that it is deliberate. I say that it

is something that has kind of grown up without anybody really thinking it through. And perhaps this is the first occasion on which this question has been fully briefed before a court.

Just to recapitulate it—and then I have another word or two to say about it—what is going to happen here; and what has happened here? Witnesses appeared before a grand jury in the investigation of these defendants. The Department of Justice, Mr. McDowell tells us in his brief, hired a stenographer, and that stenographer, pursuant to statute, went into the grand jury room and took a transcript of the testimony of those witnesses. Now, what happened next? What happened next, according to the illuminating advices that I find in Mr. McDowell's brief, is that the transcript of that testimony was taken from this district, this courthouse, down to Washington, where it is in the Department of Justice, in the Antitrust Division.

That transcript was then used by the many lawyers who have worked on this case in the Department of Justice as part of their investigatory process, part of their discovery process for purposes of this case. That transcript is also in reserve, in their hip pockets, if your Honor, please, for use at the trial. At the trial a witness will take [fol. 1306] the stand and the Department of Justice lawyers will then use that transcript to what we lawyers call—again I say we whimsically call—"refreshing the witnesses' recollection".

These witnesses appeared before the grand jury in 1952—or at least most of them did. The trial certainly will not take place until 1956. As to Lever Brothers Company the only witnesses that we know who were ever connected with Lever Brothers Company who testified before that grand jury were four in number—Mr. Luckman, Mr. Brownell, Mr. Elder and Mr. Walsh.

At the time they testified before the grand jury, your Honor, no one of those four men was connected with Lever Brothers Company, not one of them. Mr. Luckman had been president of the company. He had left the company in a situation that gave rise to a great deal of discussion in the press. Mr. Brownell had left the company before Mr. Luckman did. And I think the same is true of Mr. Walsh and Mr. Elder.

Now, the Government has used the transcript of those men for purposes of the preparation of their case, for purposes as part of their discovery. At the trial they will undoubtedly call one or more of them as witnesses, probably all of them. And at the trial these men will be confronted with portions of their testimony before the grand jury. And I, as counsel for Lever Brothers Company, [fol. 1307] will be confronted with that same material, without notice, without "by your leave" and without any prior disclosure.

Now, your Honor, let me go a little out of order here and point out that even if we could take the deposition of those men now, it would be practically useless. Mr. Luckman, in all these intervening years, has been a highly successful, very busy architect out on the West Coast. Mr. Brownell is now with a company engaged in the distilled whiskey business. Mr. Walsh has a little store up in Massachusetts. Mr. Elder is a management consultant, a very busy man. Even if we could take their deposition now, so many years removed from the event, it would probably do us very little good.

Now, let us take a look at this, if your Honor please, from the point of view, not of fairness to us—although that is a basic consideration—but, if you please, from the point of view of the administration of the Big Case, and let's see what the position is. I have tried to say to your Honor that the question here is not whether the testimony of witnesses before the grand jury shall be disclosed—because the Government has used it, they have got it down in Washington, apparently, and they all go over it, they are going to use it at the trial—but the question is: Should the Government have exclusive access to this testimony as one of the weapons in its arsenal for purposes of the [fol. 1308] Big Case?

Now, the unfairness of that is so patent that I shan't dwell on it. But what I want to comment on right here is what it means in terms of the administration of the Big Case. You see, your Honor, I regard this question that we are presenting to you on this motion as a very narrow question, in terms of the circumstances. It is the kind of a question that is apt to arise only in the Big Case, because it is only there that you have a grand jury—with some few

exceptions—it is only there that you have a grand jury that is used for investigatory purposes, and that does not indict, and then you have a civil proceeding following it in which the grand jury material is used for discovery. They are very rare cases, but they are very big ones, and they take a lot of time of the Court every time one of them comes up. So I say that it is quite appropriate to think about this in terms of the administration of the Big Case.

Now, what are going to be the consequences if we don't get access to the testimony of these witnesses? No. 1, we are not going to be prepared as we should be.

Now, your Honor, I don't make that point lightly and I don't make it because it is easy to say. It is the fact. Let me illustrate it.

Under your Honor's guidance the Government furnished [fol. 1309] us with statements of issues. In one of these statements of issues— I don't have my files here on this and couldn't check this exactly—in connection with one or more of the statements of issues the Government said that it intended to—in effect, that it intended to rely upon various conversations, telephone and personal conversations. Now, this is, therefore, not going to be a documentary case, as a good many of the Big Cases are. We endeavored —by search through our documents, the people available to us, in every way that we could—to find the source, to find some clue as to those alleged conversations. I don't assume that the Government invented them. I assume that they are based upon material in the grand jury transcript.

And I say to you, your Honor, that we must have that; we are entitled to have that; your Honor is entitled to have us have that, because your Honor is entitled to have us thoroughly prepared for trial, and not every day of trial to say, "This is a surprise and we need a recess." Now, that is point 1.

Point 2, the use by the Government of the transcript of the witnesses' testimony itself. In the Socony-Vacuum case, the opinion of Mr. Justice Douglas—that was a criminal indictment, antitrust indictment—Mr. Justice Douglas' opinion states that there were 90 times when the grand jury testimony was used to "refresh the recollection of witnesses." After a while, it appears from his opinion, the controversy among counsel as to the use of that transcript

became such that the judge took over and the judge would examine the transcript of the testimony of the witnesses be- [fol. 1310] fore the grand jury and the judge would then ask the witnesses about any possible refreshment of recollection that they could derive from their grand jury testimony.

If your Honor please, it seems to me that that is no way to run a Big Case. It seems to me that the right was to run a Big Case, and the way contemplated by the Rules of Civil Procedure, is for all of the parties to the Big Case to be equally informed.

When I say that we want to be equally informed with the Government, I want to emphasize that I am not asking for any material which is secret in the sense that we think of when we say grand jury proceedings are secret. There are certain safeguards around grand jury proceedings, and I would be the last one to want to invade them. But here the Government has made its choice, it has made its choice to bring the civil proceeding, it has made its choice to use the transcript of the grand jury proceedings, and it will, without any doubt, make its choice to use the transcript of witnesses' testimony at the time of trial. So that the real question here is whether the Government should be allowed [fol. 1311] to have that instrument of surprise, that instrument to attack the uninformed, in total contravention of the spirit and letter of the Rules of Civil Procedure."

Now, your Honor, the Government has used a quotation with which we are all familiar, and which appears in a number of cases, which says that the right to discover must yield to a loftier value. And I agree with that statement. But the Government takes the position that an equally lofty purpose to the so-called protection of the grand jury proceedings; or of the testimony of the witnesses, is to establish the truth, to find out the facts, to refresh the recollection of a witness, and that when this alleged secrecy of the testimony of witnesses before a grand jury comes in conflict with the other value of establishing the truth through the examination of a witness, through the use of that grand jury transcript for purposes of discovery, for purposes of refreshing the recollection of the witness, then they say it is appropriate to use the testimony of witnesses before the grand jury.

Now, I agree. What it comes down to is this, that the discovery of the truth, the discovery of the facts in a case of

this sort is a sufficiently valid and lofty purpose, if you will, to justify the use of the transcript of witnesses' testimony before the grand jury. That must be the position that the [fol. 1312] Government is taking. And I say that's right. And therefore we should have access to it, as well. We should also be able to use it to find out the facts, and to establish the truth in this Big Case that is before your Honor.

If your Honor please, all the points that I am making I make without reference to the nature of the Government's proceeding before the grand jury here. It is perfectly clear that the Government presented this matter before the grand jury initially for purposes of an investigation of these defendants to end up in civil or criminal proceedings. That is what they have admitted in their affidavit of March 21, 1953, and your Honor so found in an opinion entered in this case at an earlier time. I think it was May 11, 1953. Reference to it is in the Colgate brief at page 12. They started this proceeding for the purpose of ending up, with the thought of ending up, with the avowed purpose of ending up in a criminal or civil proceedings.

I hope I may be forgiven, your Honor, if I suggest that I find it impossible to believe that they seriously contemplated ending up in criminal proceedings. I don't believe that they did and the record here certainly shows—as your Honor's statement this morning and as Mr. Correa's statement indicate—that they used the proceedings before the grand jury for civil discovery. The indications are that they [fol. 1313] prepared their complaint, their civil complaint, before the grand jury was discharged.

But in any event, I am willing to assume that they went before the grand jury for an investigation thinking that perhaps they might get a criminal indictment. And I say that that makes no difference whatever, that the real point at issue here is the use of the testimony of witnesses before the grand jury, the use of that testimony for discovery by the Government, the use of that testimony for purposes of impeachment of witnesses, and to refresh the witnesses' recollection, and the possibility of use of it by these defendants for the purposes of developing our own case, of discharging our duty to this Court, which is to be fully prepared and to try this case with knowledge of all the facts.

There is no doubt that in the testimony of these witnesses there is much material that we, as well as the Government, should have. The situation of Lever—that I described to you—is a dramatic illustration of the point. The statement of issues that the Government has supplied us, making reference to conversations by telephone and in person, is another dramatic illustration of the point that there is no substitute, your Honor, for the testimony of these witnesses before the grand jury, particularly in view of the passage of time now.

[fol. 1314] I have just a few more things and then I will terminate. I share with Mr. Correa a feeling of astonishment at the Government's claim of privilege in this situation. One of the Government's defenses to our motion is that the transcript of the testimony of witnesses before the grand jury in this Court—grand jury of this Court—that testimony is privileged. And why is it privileged? It is privileged because the Department of Justice had a stenographer who was on its payroll and who wrote this stuff down, and the material was then taken to the Department of Justice, and the lawyers for the Department of Justice say it is privileged.

That is a thoroughly astonishing claim. Obviously that transcript belongs in this Court. I don't know why they took it away. I remember that when the Government wanted to take some documents to Washington that had been produced in the grand jury room here they asked us to consent to it, which we did; but apparently they can take away a grand jury transcript and then claim that it is theirs, if you please—their property—presumably immune from this Court, presumably covered by the internal rules of the Department of Justice, presumably transmuted into a confidential executive communication. They say they can do that with the transcript of what went on before the grand jury of this court.

[fol. 1315] Now, that is a preposterous claim. But the important point to me, your Honor, is that that very claim of privilege discloses a state of mind with respect to grand jury proceedings that is the source of our difficulty there. I don't blame these gentlemen for it. I think it is something that has grown up over the years. What it discloses is this same attitude that I characterized a moment ago,

that the transcript of the witnesses before the grand jury is the private property, the privileged property of the Department of Justice that they can use without notice to anybody as an instrument of warfare in a courtroom. I think there is the same mental attitude that leads both to the blanket opposition to our position here and to this astounding claim of privilege.

The claim here really, your Honor, is not that the testimony of witnesses is secret. Nobody can say that, in view of the language of Rule 6(e), in view of the cases. What they are saying is that the testimony of witnesses is something that the Government alone can use, not that it is secret, but that they alone can use for impeachment, for what we call "refreshing the recollection of witnesses." And it is that same frame of mind that has led them just one tiny step beyond that point, that tiny step being to say that this—the proceedings of the grand jury of this Court—is the property of the Attorney General, the executive [fol. 1316] department of the Government, and not subject, presumably, to examination by this Court or to the processes of this Court. Now, obviously the courts are not going to abdicate their functions, as it was put in the Cotton Valley case.

Your Honor, just in summary, I want to say again, if the Government seriously contends that the testimony of witnesses before a grand jury is secret they would be flying right in the face of Rule 6(e) and of the decided cases. If they were seriously interested in preserving the secrecy of the testimony of witnesses—which they can't do anyway, as a matter of law, because they are prihibited from doing it by Rule 6(e)—but if they were seriously interested in doing that, they wouldn't take the transcript to Washington; they wouldn't have it used by the antitrust lawyers—who change, as we know in this very case—for purposes of discovery; they wouldn't claim and reserve the right—as they will certainly do—to use portions of the transcript to refresh the recollection of witnesses, or to impeach them; they would say, "We do not use the transcript for any of those purposes"; they would choose either that alternative, or they would do what I hope your Honor is going to compel them to do in this case, in the Big Case—what I hope your Honor is going to do for reasons of fair-

ness, for reasons of good administration of the Big Case—[fol. 1317] and that is to compel them to make the testimony of the witnesses, only, to make that testimony fully available to the defendants in this cause.

Now, your Honor, if there is any sensitivity as to the secrecy of the testimony of witnesses in this kind of a situation, long after the grand jury has ceased to function, where the grand jury has not returned an indictment, where the Government has used and proposes to use the testimony, if there is any sensitivity as to this protection of the testimony of those witnesses, certainly, beyond any doubt whatever, the consent of those witnesses to that disclosure would eliminate such sensitivity.

Now, I hope your Honor—I respectfully say that I hope your Honor will handle this problem boldly. I don't myself believe that consent is necessary, but it is a conservative device that was adopted by Judge Carter in the Standard Oil case. In this circuit certainly there is in United States against Rose a direct indication that the technique of getting the witnesses' consent might eliminate any possible difficulty. I am reading from page 41 of the Colgate brief. In United States against Rose the Court of Appeals for this circuit said:

"Since all the defendant desires is a transcript of his own testimony, the sanctity of that which transpired before the grand jury is hardly in question. In addition, such [fol. 1318] disclosure would not subvert any of the reasons traditionally given for the inviolability of grand jury proceedings."

And I say that similarly where the witness consents it is beyond me to see any possible infringement of principle that could possibly be involved. And certainly we are not going to be moved by fanciful and remote fears.

Your Honor, in concluding I would like to call attention to an article that appeared in the Yale Law Journal, and which we did not cite because our brief was written before Mr. McDowell filed his brief. I spoke at the beginning of my argument about a trend. I think, your Honor, that there is a trend towards requiring the Government to make disclosure in appropriate cases. I think that this case is part of that trend. Certainly the cases have been arising with great frequency in the District of Columbia

and elsewhere. And I think they are appropriately characterized in a little statement which, with your permission, I would like to read from this article that appeared in the Yale Law Journal, Volume 59, at page 1451. It is for December, 1950. It is an article called Government Immunity from Discovery.

"No one has more eagerly resorted to the discovery machinery than the Government; no one has been more grudging in making it reciprocally available." They are citing cases here. "Viewed against traditional notions [fol. 1319] of fair play it is not surprising that Government attempts to 'thwart the efforts of a plaintiff' to obtain disclosure have been judicially labeled as 'unseemly,' as an 'unjust and tyrannical exercise of power.'" Citing cases. "As former Attorney General Mitchell said, 'it ought not to be necessary to resort to discovery against the Government' for the Government litigates with its citizens and ought to be frank and fair and disclose all the facts."

The Court: The only trouble, Mr. Fortas, is that an Attorney General never says that until he is the former Attorney General. That is when they become very much interested in the public welfare.

Mr. Fortas: That is perfectly true, your Honor.

The Court: Isn't it funny how the philosophy changes.

Mr. Fortas: For the reasons stated, your Honor, I respectfully urge that the motions be granted.

The Court: Now, how many more for the defendants, the General and who else?

Mr. Royall: Your Honor, except for the little matter that was left open about the questions asked Mr. Siddall on the grand jury matters, which will almost certainly follow the disposition of this— and I may have to say a word or two later, but I don't think so—except for that I want to merely [fol. 1320] say that our interests and our views are the same as the other defendants. They have fully presented the considerations. You have before you three briefs from us, including the one in the Siddall matter. It seems to me that I would be wasting time to try to add to the positions stated by other defendants' counsel. Unless your Honor desires me to do so, or has any questions to propound, I will just adopt their argument for myself.

The Court: You may well do so. Any other defendants to be heard from?

Mr. McDowell, we will take a little rest now before you start.

(Short recess.)

The Court: Mr. Fortas, in your moving papers you did request a list of witnesses.

Mr. Fortas: Yes.

The Court: Are you still interested in that?

Mr. Fortas: Yes, your Honor. It may be entirely academic. That is to say——

The Court: Depending on how I decide it.

Mr. Fortas: Yes.

The Court: All right. Now, Mr. McDowell.

STATEMENT BY MR. MCDOWELL

Mr. McDowell: Your Honor, I recognize that there are many inequalities and many kinds of unfairness which are unavoidable in the trial of any case, even perhaps in cases other than antitrust cases.

[fol. 1321] The Court: Yes, I found out the other day in a tax situation where I had the distinction of being reversed by the Circuit Court of Appeals, in which they said the result was very harsh—but that's too bad.

Mr. McDowell: Your Honor, I think perhaps sometimes it is a mistake to take completely literally the model which appears before my eyes here—fiat justitia, ruat coelum. Sometimes there are people who don't like the heavens to fall.

The Court: No, because if the heavens were to fall you wouldn't have any justice, either.

Mr. McDowell: And that is our position here, your Honor.

Despite the attractiveness of the propositions put forward. We concede many of them are, on first blush, not without considerable persuasion.

But, your Honor, one of the kinds of unfairness which I think we can spare the defendants today is the necessity of having to speak with four voices whereas the Government is free to speak with but one voice. In order to spare them that unfairness today I brought Mr. Carlson

and Mr. Margolis along. And if the Court will grant us that privilege, I would like to ask Mr. Carlson to discuss the first group of problems which we see here, which go to the policy of the courts with respect to the privilege of [fol. 1322] grand jury secrecy. And then I would like for Mr. Margolis to address himself to the particular reasons which require in this case, as well as in cases generally involving the use of the grand jury, that secrecy be observed. And then if it should be necessary perhaps I may say a word again about the problem of privilege. Your Honor, I don't think in all we will take an hour.

The Court: Don't worry about the time. This is a very important question and I want it thoroughly discussed. All that I don't want is repetition by any of the speakers. I happen to be fortunate in having a retentive memory.

STATEMENT BY MR. CARLSON

Mr. Carlson: The Court asked us to primarily direct ourselves to rebuttal material. The first matter I have to take up is only in part directed to that.

The Court has two cases directly in point on the question we are involved with here. And those cases are the Rose case, which says that grand jury transcripts are secret, and the G. M. case. And nowhere in argument of counsel have I seen either of those cases distinguished. The rule remains. And it is not a rule that applies just to any particular element of the grand jury, but it applies to the transcript which the defendants are here seeking.

The Court in its remarks, in the memorandum that you addressed to counsel today, made one statement as to the [fol. 1323] rule in grand jury matters, grand jury transcripts, the disclosure of grand jury transcripts, and then said that there were some exceptions.

The Government's position is essentially that the only exception that we know of that has support of the cases, where grand jury transcripts have been delivered to the defendant, is in a perjury situation. And, as your Honor knows, that is a special situation.

The Court: Oh, yes, indeed. Nobody can deny that under such circumstances a man should have the transcript, should know what he said.

Mr. Carlson: That's right, the act for which he is being tried is one that occurred right in the grand jury room. So the Government has to breach the secrecy in order to bring the prosecution. And it is natural in a fair trial, as an incident to the fair trial, that the defendant have his own testimony.

Now, the Remington case—that is the case on which the Court relied in the Rose case—did allow the defendant his own testimony. The Remington case went on to say that Remington had no right to Remington's former wife's testimony unless certain special circumstances were called into view. Those circumstances, I believe, are that it should be shown that the witness involved, other than the defendant, is a turnabout witness.

[fol. 1324] The Court: Yes, unfriendly.

Mr. Carlson: That's right. And also that the judge doesn't have to dig through the length of the transcript and, in effect, become an advocate for the defendant.

And that, I apprehend, and we take the position, is a special situation, just as most of these situations—in fact, all of them we know about are—in which disclosure has been had.

The Court: Do you mind if I think out loud a minute on the Remington case?

Mr. Carlson: No, sir.

The Court: If a man tells the truth about any given situation why must he see his testimony before a grand jury? There is only one truth, isn't there?

Mr. Carlson: That's right.

The Court: And if he told the truth, why must he have a transcript of what he said in the grand jury room?

Mr. Carlson: We are even in a different position now than we used to be on that subject, your Honor.

The Court: I am only talking about Remington now. I am thinking out loud about Remington.

Mr. Carlson: It used to be, as you recall, the law was that—in certain districts, at least—the accused would be sworn and he couldn't even talk about what he said before [fol. 1325] the grand jury—the witness, that is. In that situation the witness was faced with a very difficult problem. He couldn't communicate to his attorney as to the subject matter on which he had been examined. That is not the situation any more. And the defendants in these

cases, in all the cases, now have access to what the witnesses' story is, at least certainly as far as their own people are concerned.

And here we are concerned primarily with that, in that Rule 6(e) now states within its terms that no obligation of secrecy shall be imposed other than stated therein. That removes that former situation in which the witness couldn't find out what his rights were.

So what we are left with, your Honor, is a rule that grand jury transcripts should be secret.

And the rule has a very good reason behind it. And that is not a reason that goes to prosecution or the use by the Government of any particular grand jury transcripts, or the value of any particular fact that may be brought out, but the rule goes to protection of the grand jury itself, keeping the grand jury an independent body, where it can act, not on behalf of the Government, not on behalf of the Executive, and not necessarily on behalf of the Court, but as an independent arm to prevent any kind of oppression or injustice that may arise. The grand jury can take [fol. 1326] cognizance of any of these things and has often done so. And that is the real basic reason for protection of the grand jury and protection of the transcript.

The Court in its memorandum made reference to the Herzog case. Our research did not reflect any citation from the Herzog case that would indicate that the lower court had ruled upon the matter raised by Justice Douglas as to the substantial question that was involved.

I might say, however, that whatever the lower court would hold on that, I think it would not be any assistance for us here because the situation that was involved in the Herzog case was that same situation, I believe, which involved Remington's wife in the Remington case. That is, a turnabout witness was involved. Justice Douglas quoted at length from the Alper case and indicated that if these special situations were to be called into play a substantial question would be raised for the Circuit Court to pass upon, which would allow defendant bail.

So even if the Circuit Court holds in that particular case that the District Court when the trial is had should look at the testimony—and the Court did not make clear whether the District Court should look at it or the witness

should have it—even if the Circuit Court held that the District Court should look at that testimony, within the rule of the Alper case—and I might note in passing that [fol. 1327] the Alper case ruling merely meant looking at the transcript by the judge and not making it available to the defendant. I can't see any way that that would help the defendants here. And they, as I understand it, seek to roam at will through the grand jury transcript, just lay the whole thing bare. So, really, the ruling is a much more limited ruling and on that specific trial situation.

If memory serves me right, the point that the Court asked us to discuss today was the reliance that may or may not have been placed upon the Garsson case by Judge Leahy and his ruling in the General Motors case.

From the opinion I find it difficult to draw the conclusion that Judge Leahy decided on anything but the merits of the situation before him. His opinion reflects that he took into consideration many of the questions raised by counsel here. And he says—I am not sure I have the page number on this, I think it is at 486 and 487—one statement he makes in reaching his conclusion is, "I do not find in the present action for civil penalties any justification for ordering production or inspection and copying the transcripts of the grand jury's meetings."

It is pretty plain that he must have been speaking about just exactly what is in point here, regardless of what view he may have taken of the holding in the Garsson case. And the Government takes the position that the General Motors [fol. 1328] case is indistinguishable from the facts here. At least I have heard nothing here today from defense counsel that would distinguish Judge Leahy's opinion.

One thing that counsel have alluded to is that the General Motors case, since it was before the Rose case, is in some way overturned, or at least rendered inapplicable by the Rose case. That is a very difficult thing to understand, for the Rose case stood for the proposition that grand jury transcripts are secret, and called forth a particular transcript in a particular instance.

The General Motors case also stands for the proposition that grand jury transcripts are secret. There they are in the court and the Court says, "You just haven't shown me any reason for disclosure."

I believe those are all the points that I had to make to your Honor. So I will defer to Mr. Margolis.

The Court: Thank you.

STATEMENT BY MR. MARGOLIS

Mr. Margolis: As Mr. McDowell told your Honor, I am going to confine my remarks primarily to the reasons why the Government says here that the defendants haven't suggested really, as we view the situation, any reason why the traditional rule of secrecy surrounding grand jury proceedings should be lifted here. I think your Honor put it that public policy in the enforcement of the criminal anti-trust laws outweigh such an asserted right.

[fol. 1329] The Rose case was preceded—or the reasons given in the Rose case were summarized from an earlier case, United States v. Amazon Industrial Chemical Corporation. And the quotation which appears in, I think, the briefs of all counsel for the defendants from the Rose case omits the very next paragraph which was included in the Amazon case. And with your Honor's indulgence I would like to read that to you.

"It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself as the direct independent representative of the public as a whole rather than those brought before the grand jury. Of course, these latter are intended directly to share in the benefits from this rule of secrecy."

That quotation is from the Court in the Amazon case—and the Rose case doesn't quote it either—but the point I would like to make now is that, as I understand counsel for Colgate, particularly, in this situation he says the reasons for disclosing the grand jury transcript are weighty reasons and to do justice your Honor should really permit the defendants to see the transcript.

But this, it seems to us, overlooks the traditional reasons given for preserving the transcript and the secrecy, namely, not that the particular witnesses, or the particular grand [fol. 1330] jury in this instance would be plagued, or importuned, or that there might be subornation of perjury, but that it would create a very dangerous precedent and that it would, in effect, make it virtually impossible for

future grand juries to conduct their affairs expeditiously and efficiently and to discover whether or not a crime had been committed.

Now, I was very interested to hear counsel for the Association recognize the fact that the antitrust laws—the Sherman Act basically describes conduct which is criminal and it declares such conduct to be unlawful.

And then Section 4 of the Sherman Act, of course, gives the Government an alternative remedy. They can come into court and seek civil relief, if such relief seems to be suggested in the circumstances.

Now, a case which the Government cited in its brief, which we filed on December 7th, I think supports this and gives added weight to it. It is the quotation which appears on page 19 from the Deere case—United States v. Deere, 9 F.R.D. 523. And, as your Honor will note, the Court there said, with respect to the antitrust laws, and the privilege of the Government to maintain in secrecy certain information obtained during the course of an investigation —or during the course of a trial, or during the course of preparation for trial of an antitrust case:

"Actions under the antitrust act, however, are clearly [fol. 1331] actions based upon the public interest. This is apparent from the very nature of the laws, for they are designed to protect the commerce of the nation and their violation in many instances constitutes criminal activity. Although the instant action is not a criminal action, the basis of the privilege is one of public policy for protection of the public interest, not the criminal nature of the case. It is for the protection of any person——"

The Court: Oh, no, you misread that. "It is not for the protection——"

Mr. Margolis: I am sorry. "It is not for the protection of any person. The considerations which require the withholding of information and its source from the accused by the Government in criminal cases are present also in civil antitrust actions brought for the public interest by the Government."

Now, your Honor, the Government contends that this is a principle which this Court and all courts should recognize with respect to investigations which have been con-

ducted by the grand jury, that they, too, are in the public interest and that the information which is obtained by the grand jury can only really be obtained if the persons who testify before that body feel free to speak forthrightly. I think Rule 4, stated in the Rose case, puts it much better than I can, that the witnesses should feel free [fol. 1332] to——

The Court: You mean to encourage free and untrammeled——

Mr. Margolis: —to encourage free and untrammeled disclosures by the witness.

Now, in this particular situation, where you have an investigation conducted concerning activities which may violate the antitrust laws, economic, business reasons, virtually all of the witnesses during the course of any investigation of antitrust violations are apt to be either employees or business associates of potential defendants. Such persons, we suggest, are peculiarly susceptible to pressures. If they are going to speak forthrightly at all, they will probably do so more easily if they feel that their testimony before the grand jury, at least, is secret.

Now, it is true, they may consent at some future date to the disclosure of their testimony. However, if a precedent is created, that it becomes generally known throughout the land that testimony before a grand jury may become public knowledge, that they may be asked to give their consent, they may withhold a little more from the grand jury than they otherwise might.

These pressures—I want to make it clear, I am not trying to suggest that the defendants in this case would, in any [fol. 1333] way, be guilty of applying such pressures, but the Government, as you know, is conducting investigations throughout the nation at all time of these and other matters, and less respectable defendants might feel inclined to apply the pressure to their employees to guide their testimony, so to speak, before the grand jury.

Now, this is a very real danger, disclosing transcript, even upon consent, when the consent could be obtained perhaps by pressures. This would make it virtually impossible for the Government to effectively discover anything about criminal conduct. And particularly this is

true, we suggest, where the investigation is concerned with economic activity.

Now, there is a case that we did not cite in our brief which we feel is also pertinent to the situation here. It is a Third Circuit case, Alltmont v. United States. And that case involves——

The Court: What is the citation?

Mr. Margolis: It is 177 Fed. (2d) 971, Third Circuit, 1949.

That was not an attempt to obtain grand jury testimony. But the language of the Court there, we suggest, is very pertinent to the siuation which your Honor has before him, where you must decide whether the equities on the side of the defendants for obtaining this information outweigh [fol. 1334] the tremendous and traditional secrecy rule which is surrounding grand jury proceedings.

Now, there the Court said, with respect to an attempt to get statements of witnesses under Rule 33, and the defendants suggested—and the lower court held—that the best records of these statements would be the actual statements obtained by the Government from the witnesses. And in addition to requiring the Government to answer the interrogatories the lower court required the Government to append those statements obtained from the witnesses. And the Court of Appeals said this:

"The rules"—speaking of the Civil Rules of Procedure—"however, do not give a party an absolute right to obtain either the text or a resumé of the statements which the adverse party has obtained from the persons whom he or his agents have seen. Having obtained information as to the existence, nature and location of the statements through interrogatories he is in a position to move for their production under Civil Procedure Rule 34 or Admiralty Rule 32"—that was an Admiralty case—"but he must in every case make the showing of good cause required by those rules for their production. In other words, he must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire [fol. 1335] to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry

in seeking out and interviewing prospective witnesses, to help prepare himself to examine witnesses, or to make sure that he has overlooked nothing, are certainly not such circumstances since they are present in every case."

Now, in the situation confronting your Honor here the defendants admit freely, particularly Colgate in its brief says, "We know the names of 28 of the witnesses," and they believe that these are all, or virtually all, of the witnesses who appeared before the grand jury. Defense counsel also suggests, however, that a long time has passed since the grand jury convened, but none of them have made the statement, that I have heard—nor does it appear in their brief—that they did not, or that they were precluded from interviewing these witnesses as they came out of the grand jury room. Nor do they suggest that it would not have been possible for them to take depositions three years ago, immediately after the case was filed. But they say, "Well, a long time has passed and these witnesses may well have forgotten exactly what they said before the grand jury." But as your Honor pointed out, in colloquy with Mr. Carlson, if they spoke the truth once there is no reason to believe that they wouldn't speak the truth again at a deposition, or really that they don't remember the facts [fol. 1336] about the transactions about which they testified before the grand jury. And the Government suggests that the defendants have really shown no reason why it is essential to the preparation of their case, in the case now pending here, for them to have these transcripts, and violate —or invade the secret province of the grand jury when to do so could do nothing but harm the institution.

The Government really is here today, as well as a litigant in United State[illegible] v. Procter & Gamble—it is here acting in the public interest, trying to protect the grand jury system, the whole process.

Of course, we have an interest in it, because as representatives of the state we have to be present to hear what crimes have been committed, and take the transcript, and to prosecute those crimes. It would make it virtually impossible for us to do our job, we feel, if the transcripts were disclosed, and would not substantially or materially benefit the defendants in this case if the transcripts were disclosed to them.

The Court: Is it always the practice of the Department of Justice to take the transcript of grand jury proceedings to Washington?

Mr. Margolis: Your Honor, I believe it is not. I think there are cases in which no transcripts are taken. They are very rare. I know of no one in my particular experience [fol. 1337] but I have heard this is the fact.

The Court: I was United States Attorney here for some three years. I never knew them to take one transcript of a grand jury proceeding while I was here.

Mr. McDowell: Your Honor, may I add to the answer?

The Court: Yes, sir.

FURTHER STATEMENT BY MR. McDOWELL.

Mr. McDowell: It is my understanding that the practice depends upon the particular office having supervision and direct responsibility over the particular investigation, the grand jury investigation involved. In the great mass of cases the grand jury investigations are conducted by the United States Attorney, or Assistant United States Attorneys, and those transcripts are customarily kept by them, in their offices.

The Court: Yes.

Mr. McDowell: But in those cases where attorneys are sent out from Washington, as is ordinarily the case in antitrust matters, because there isn't sufficient in any individual district to justify having attorneys specialized in such matters, then customarily the transcripts are taken by the attorneys to Washington.

I think that makes a convenient starting point for this whole question of claim of privilege here involved. I would like to put that thing in perspective a bit, if I [fol. 1338] may, by clearing up some apparent misunderstanding about the exact nature of the privilege which the Government considers to be involved here.

As we view it, we are not arging upon your Honor some narrow property interest of the Department of Justice in a particular piece of paper. I felt it was necessary to make the point in the brief that the transcript, as such, is the property of the Department, because of the point made by Colgate in its brief—apparently in anticipation of the Department's position here—to the effect—said the Colgate

brief—that there would be no basis, in any event, for any claim of privilege by the Government here because the transcripts were not in the custody or possession of the Department of Justice, but, rather, were in the custody and possession of the Court.

Now, I think that is a formality which need not be emphasized, but may be necessary to a formal claim of privilege. I don't say that it is necessary, but it may be, and I didn't want to overlook it, because of the apparent importance given to it by Colgate. So that I think we must recognize that there is a property right by the Department in the transcripts. And if that is necessary to the assertion of the claim of privilege, then that requirement is satisfied.

[fol. 1339] But the privilege with which we are concerned here is the grand jury privilege, it is not a particular privilege of the Government; it is a privilege, if you will, of "the people", in the original meaning of the term, "the people", as used in the Constitution of the United States. As your Honor will recall, the recital begins, "We, the people." The grand jury had its roots in the interests of the people in the redr s of grievances and protection from unjustified and unwarranted accusations.

The Court: You probably have never read the arguments by those who claim the grand jury's usefulness has ceased a long time ago and give very cogent reasons why you don't need a grand jury any more. Did you ever read them? A lot of brilliant men have written on that in the last generation.

Mr. McDowell: Your Honor, I have seen some argument to that effect, but I may say——

The Court: Some are quite persuasive.

Mr. McDowell: I may say, the arguments that I have seen to that effect have not been very persuasive to me.

The Court: Do the reasons exist now for the grand jury that existed at the time it was originally created, when you had tyrannical kings and despots?

Mr. McDowell: I think perhaps it is even more necessary today.

[fol. 1340] The Court: Do you think so? With all our liberties and protection of liberties, do you think the grand jury is more necessary than it was five centuries ago?

Mr. McDowell: I do, your Honor.

The Court: Very good.

Mr. McDowell: For this reason, that, depending upon your particular views as to the function of government, you may welcome it or regret it, but there has been in our time a tremendous growth in the function of government, and with that a growth in power, and with that an opportunity for abuse.

The Court: Agreed. Go ahead.

Mr. McDowell: And the grand jury stands today, I think, just as strongly as it stood in the days of Magna Carta, in the days of the Constitutions of Clarendon, in 1174, for the protection of the people from the abusive exercise of the power of government. We don't witness that very often. Fortunately we haven't had the kind of occasions that call it into play, but it is not more than sixty years ago that a so-called runaway grand jury in New York City, just across the river, was instrumental in relieving the people of New York from the tyrannous abuses of an administration dominated by a corrupt——

The Court: Are you referring to the Seabury investigation?

[fol. 1341] Mr. McDowell: No, your Honor, I am referring to Boss Tweed. That's a bit more than sixty years. I am sorry.

The Court: Yes, sir.

Mr. McDowell: It's about eighty years.

The Court: It's about eighty years ago now.

Mr. McDowell: Yes, your Honor.

The Court: We have had men since then who made Boss Tweed look like petty larceny. Only they do it in a much finer way now. They are not quite so raw as Boss Tweed was.

Mr. McDowell: Your Honor, it is an extremely interesting subject, and I think that your last comment——

The Court: I am thankful that we still have the grand jury, and I am thankful that we have petit juries, too, believe me, despite all the cogent arguments against them.

Mr. McDowell: I merely wanted to bring the point out, your Honor, that there is something more at stake here than the mere——

The Court: Than the Procter & Gamble case, you mean?

Mr. McDowell: Yes, your Honor.

The Court: That is why I was interested in hearing from you.

[fol. 1342] Mr. McDowell: And more than the position of the Government as a litigant in a particular case. I don't think it is necessary to say more about that, your Honor, other than perhaps to note one comment you made in your remarks about the portion of the Government's brief beginning on page 19, which is addressed to the question of privilege. And I would like to say there that I think it is true, the essential question is whether or not the grand jury privilege exists and exists here in such scope that it must be recognized, and would have to be recognized by the Court even if the Government didn't assert the privilege, because the Court is just as interested in the safeguarding of the grand jury function as the Government is, perhaps more so. But the cases set forth there are put in the brief for the purpose of giving your Honor a lead to the cases which we feel express the principles relating to this problem of governmental privilege, and give some indication of the way in which the courts in recent leading cases have approached the resolution of the problems there.

And primarily those cases are for the purpose of leading up to the Reynolds case, which is a recent authoritative ruling occasioned by the problem which came up in this circuit. And I think your Honor undoubtedly has had occasion to read and consider the ruling, in connection with other matters, of Judge Maris of this circuit in the Reynolds case. And your Honor may recall Judge Maris [fol. 1343] held there that the lower court had correctly required that the privileged matter be produced, giving serious discussion to the whole problem of privilege and recognizing the scope of the privilege, but giving primary emphasis to the requirement of the plaintiffs in that case to have those very accident reports in order to make out a case at all.

Unlike the situation here, the Reynolds case, where there had been a crash of an airplane, a Government plane carrying secret equipment, the plaintiffs contended—and I think with good reason, as Judge Maris so found—that they could not prepare their case, they could not ascertain what the facts were about that crash, and about the prob-

lem of negligence, and so forth, if they couldn't see the statements and the reports of investigation which the Government itself had made. And yet despite the cogency and persuasiveness of the reasoning there the Supreme Court found that there are matters which override the interests of a particular litigant in a particular case, not in an arbitrary fashion. That was why I came down to the Reynolds case, your Honor, to illustrate the technique of the decision.

And I think that is the problem with which your Honor is confronted here. When you have a collision between two fundamental public policies, such as the policy to [fol. 1344] which I do not wish to yield to the defendants in supporting, and that is the policy of disclosure in civil discovery—when you have a conflict, such as here, between the public policy and the public policy which protects the secrecy of the grand jury, then the Court is called upon to weigh carefully the precise considerations which are advanced in support of the claim that in this case disclosure must be made. And only in so far as something can be said on that side which becomes persuasive to the Court is there occasion for considering a decision contrary to a fundamental public policy guarding the secrecy of matter which has been privileged down through the generations in the way in which grand jury testimony has been privileged.

Now, in our view, your Honor, the defendants have said nothing here which would justify giving serious consideration to the claim they advance for this transcript, when it is all stripped away. As I listened, and I tried to get down to what reasons they could advance, I couldn't help but feel that there were two themes only underlying the whole business: One, the suggestion that a witness may have forgotten, and when he gets around to the testimony at the trial he may be confronted with some inconsistent statement made earlier. I don't think that needs serious consideration.

[fol. 1345] The other is at first attractive, but I think it lacks substance. That is the proposition that there is some unfairness here, that the Government has used, or abused, if you will, the grand jury process for the purposes of civil discovery. Counsel have, in response to your Honor's

questioning—as I understood counsel—asserted that they do not maintain there is any abouse, or been any abuse by the Government. So that it really comes to a question that they think just because the Government has had a chance to record statements by these people in connection with a grand jury investigation, which may or may not have covered these points, then they should have the opportunity of seeing that. And were it not for the grand jury—for the fact that the examination was conducted before a grand jury, I would think that there would be some weight to be given to their claim. But we don't seem to meet—or see eye to eye on this problem of the grand jury thing.

The Court: I didn't think you would. In fact, I would have been shocked if you had agreed with them.

Mr. McDowell: Now, your Honor has directed a question specifically to me which I find it hard to answer. Before coming to that, may I say, in order to clarify——

The Court: I only asked you that because of the problem that is now pending before Judge Hartshorne where [fol. 1346] they are asking them in interrogatories.

Mr. McDowell: Your Honor, I would just suggest one proposition there and that is that it isn't possible to set this case, the Big Case, to one side and say, "This is it. It is only here in this unusual situation, just in this civil discovery." If you are going to give the defendants in an antitrust case the transcript, why shouldn't defendants in other civil cases have the transcripts?

The Court: That doesn't necessarily follow at all, Mr. McDowell. I don't agree with you at all, because the Big Case is certainly sui generis, in my opinion. There is nothing like it, and no judge relishes hearing it. But what I don't want to be confronted with during this trial is constant adjournments, as has happened already in these antitrust suits—surprise, surprise, surprise—and which may happen very easily.

That is all I have in mind, the organization of the case, to try it efficiently and expeditiously.

Mr. McDowell: I assure you, your Honor, that in the little antitrust cases that I have seen the defendants feel quite as put upon as the defendants in this big antitrust case. And I can imagine that they would feel just as en-

titled to see the transcripts of relevant testimony, where there had been a precedent grand jury investigation, as [fol. 1347] these defendants. And I must say, your Honor, that I think it would be hard to draw the line.

The Court: But we do arbitrarily draw lines, don't we, in courts? All we have to say is that the facts here are different than they are in other cases. And that settles it. Doesn't the Supreme Court say that often? "But the facts here are different"—period. If they don't like it, there is nothing you can do about it. "We distinguish it"—for this reason or that reason—and then they vote four-to-four on it, showing that honest men can differ—honestly, too.

I am not saying that they have no right to differ, because if I believe a certain way—I am just as stubborn as anybody else. I am not a "go along" judge, either. But there are situations, Mr. McDowell, where people can honestly differ and both be sincere—very sincere, too.

Mr. McDowell: I quite agree, your Honor. I merely wanted to suggest that it does not necessarily follow that you have a unique situation here and that what is done here would not become a precedent which might not lead to results in other cases. That is the growth of the law.

The Court:—we are told that lawyers and the public shouldn't worry about conflicts between the circuits, that is what the Supreme Court is there for. But when they don't [fol. 1348] take these cases up to the Supreme Court then the sitting judge has to stew with them. This circuit says so and so and that circuit says just the opposite. And the Government is "great" for not taking them up, either, when they think they might lose. I have noticed that. I just had one in a freight rate case. I wondered why they didn't take it up.

And these are problems we have in the law, Mr. McDowell. Fortunately we have a very orderly way of deciding it: If the trial judge is wrong, the circuit; if they are wrong, the Supreme Court; if they are wrong, that's too bad.

I have had a lawyer come here and tell me, when the New Jersey Supreme Court decided unanimously against him, "'I still think they are wrong, Judge Modareili.'"

And I think he meant it, too, for this lawyer, still thinks they are wrong.

Well, it's the old Irishman's story. He was open to conviction, but nobody could ever convince him.

Mr. McDowell: Well, your Honor, I had a case in this very court which the Supreme Court reversed where I thought we had won. I don't know how the judge in this district feels about it, but I think the Supreme Court decided wrongly.

The Court: You see, you were so concerned that you [fol. 1349] were right about it. See, a lawyer can become evangelical, too, about situations.

Mr. McDowell: I quite agree with that, your Honor.

The Court: You have heard them and so have I. I have had lawyers stand and tell the jury, "You can't convict my man." And, believe it or not, Mr. McDowell, they did—in ten minutes. In ten minutes they came back, "Guilty."

Mr. McDowell: Your Honor, I made the mistake of telling a judge last year that he couldn't do so and so on a motion for a bill of particulars.

The Court: But he did.

Mr. McDowell: The judge said, "What do you mean, Mr. McDowell? I have done that. You may sit down."

The Court: Well, somebody has to have the final word, you know.

Mr. McDowell: Well, your Honor, as far as I am concerned, I have said all that I have had to say, and you may have the final word.

The Court: Now, Mr. McDowell, I take it that nobody of the Government agrees with Professor Wigmore at all, do they?

Mr. McDowell: Well, we have some trouble about Professor Wigmore, your Honor.

[fol. 1350] The Court: He is considered an eminent authority. I don't say I agree with him yet, don't get that impression from what I say. I am trying to search out your mind and everybody else's.

Wigmore usually gives a lot of thought to anything that he gives voice to. And he spends all his time doing that. He doesn't have to prepare cases, write briefs, or sit in trials. That is all he does—philosophize. Like my friend, Dean Pound. He is always philosophizing. He says to

me, "You haven't time to philosophize. You are a trial judge in a district. You haven't time to philosophize. They keep you too buy."

You can only philosophize when you have a lot of time on your hands. You can be sure that I don't have, nor do any of my brothers in this district have a lot of time on their hands.

What do you think of Wigmore's ideas on the subject?

Mr. McDowell: Well, your Honor, let me say very briefly what we think about that proposition. Dean Wigmore has stressed, by reason of his analytical, evidentiary approach, the question of the privilege which the witness may assert. And he concludes that the witness, in effect, has no privilege——

The Court: That's right.

[fol. 1351] Mr. McDowell:—after the grand jury has ceased to function. But in doing that he overlooks—and when he gets down to the conclusion he overlooks a statement which he made in his earlier analysis, in which Dean Wigmore conceded, by implication, that the privilege is not entirely or alone that of the witness. Only the privilege of the witness is what he is concerned about when he gets down to his conclusion. But he says above, in clearing the ground for his analysis in his argument, he says that privilege is not entirely that of the state or of the people, thus conceding that the privilege is—in part, at least, that of the state, although he is not concerned with that question for the purpose of his argument.

And in another place he says that the privilege grows out of the public interest in the protection of the grand jury institution.

So that Dean Wigmore himself has recognized, we think, fundamentally, the interest of the state. He has moved on into the question of the circumstances under which the particular witness may claim privilege. I think if this particular question were to be fitted into his rationale he would say, as does the Government here, that it makes no difference that a grand jury has ceased, it makes no difference that the witness may be content to waive, the [fol. 1352] public interest still overrides that. And I am led to that by the conclusion which he reached when his

attention was drawn to an analogous point in connection with the informer's privilege—very closely related.

The informer's privilege, I submit, your Honor, is very closely related to that of the grand jury privilege. The same public rationale applies, the public policy of encouraging people to give knowledge within their possession freely to the Government, or to prosecuting authorities, under an express or implied assumption and practice that their identity, their communication is going to be kept secret, privileged. And Dean Wigmore says, in Section 2374—and I didn't put this in our brief, your Honor—that the informer's privilege is a "genuine privilege", by which, I assume he means absolute.

And then, if I may quote a little bit more, he said, "The privilege must be recognized for the communications made by informers to official prosecutors because such communications ought to receive encouragement and because that confidence which will lead to such communications can be created only by holding out immunity from a compulsory disclosure of the informant's identity."

But it is implicit in Dean Wigmore's discussion of that point that the witness may not waive. He does not criticise, for example, some of the cases which have applied [fol. 1353] the doctrine that the informer may not waive privilege—it is the privilege of the state, not the privilege of the informer.

Your Honor, I didn't go into that in the brief, but may I just mention one or two of the leading cases, since you have raised the question, and it is so closely related to Dean Wigmore's argument? The leading case on the scope and application of the informer's privilege is Worthington v. Scribner, 109 Massachusetts, 487—a rather old case, 1872. One of the most frequently cited later cases in the Federal Courts is Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Federal 353. That was in the Eastern District of Pennsylvania.

There are other cases applying that doctrine, that the informer may not waive, because it is the privilege of the public, not of the informer. A number of those cases are collected and discussed in an article, an interesting article, in the Vanderbilt Law Review, 3 Vanderbilt Law Review 73 and 76.

Now, along the same line, your Honor, there is a very trenchant analysis of this whole problem of the privilege claim, and the public policy considerations in the Kohler case, which I also did not cite in our brief. That's U. S. v. Kohler, 9 F.R.D. 289. That was a decision by Judge Kirkpatrick in the Eastern District of Pennsylvania. and on [fol. 1354] the very narrow question which Mr. Fortas said, at the end, he still will press; of application for the names of the witnesses, that was denied in the Central States case, your Honor. Another case which, I am sorry, is not in our brief. May I give the citation for that? United States v. Central Supply Association, 34 F. Supp. 241. That's in the Northern District of Ohio, 1940.

Have I answered your question about Dean Wigmore?

The Court: Yes, sir; if public policy should be considered.

Now, I ask you about the possibility of getting an affidavit.

Mr. McDowell: Oh, yes. Thank you, your Honor.

The Court: I don't know whether you are free to answer that now, or whether you must consult the higher echelons of the Department, as to whether they think it should be done or shouldn't be done. I don't want to embarrass in the least, Mr. McDowell, I assure you of that. If you are not free to answer without consultation, you just say so. But I would like an answer one way or the other.

Mr. McDowell: Well, your Honor, as far as I am concerned—my personal view—I have no reluctance whatever to furnish such an affidavit. On the other hand, an affidavit from me, I am afraid, would be of little value, [fol. 1355] because I had no connection with this case until last year, and I really would be unable to address myself to anything except the third point of your Honor's questionnaire, and that is as to what use the Government might make at the trial.

And I must say, your Honor, I listened with great interest here to Mr. Fortas dwell upon the use which the Government is going to make of this transcript at the trial. I had rather thought that was going to be a question for your Honor to decide. You know, these cases—the Socony-Vacuum case, these other cases to which all these references were made—those were criminal cases. The doctrine is well established in the criminal law that transcript may be

used for impeachment or refreshment. I don't know of any such doctrine in a civil case, where there has been precedent grand jury testimony.

My own view—and I say this without prejudice, your Honor; I have given some consideration to it—my own view is that if the occasion should arise in the trial of this case where I would think that it might be appropriate or desirable to refer to a transcript of grand jury testimony, my view would be that question should be submitted to the Court for advice and ruling as to whether or not it would be appropriate.

The Court: I have never had anyone try it on the civil [fol. 1356] side, I will admit that, in the five years I have been here.

Mr. McDowell: Your Honor, in so far as the advisability of getting such a statement and affidavit, as you have suggested, I really question what utility it would have. I think that the fundamentals are pretty clear here, that Rule 6(e) authorizes the Government attorneys to use this transcript in the performance of their duties. Now, when the grand jury investigation involves an investigation under a criminal statute, such as the antitrust laws, query: During the pendency of the grand jury what limitations, if any, there are upon the development of information by the Government from all sorts of sources, including the grand jury source?

Certainly, so far as disclosure is concerned, that would be improper and certainly that is forbidden, expressly, by Rule 6(e), which we observe. And I may say, these transcripts are not thrown about lightly. They are treated with considerable care.

So that I question, your Honor, what the value of such an affidavit would be. But if your Honor wishes me to, I would——

The Court: Or a statement. I don't have to have a sworn affidavit.

Mr. McDowell: Pardon?

[fol. 1357] The Court: A statement will do, for my purposes.

Mr. McDowell: Well, your Honor, I was going to say this, as you have probably gathered from the briefs which we filed a short time ago, since the rather surprising pro-

nouncement by Judge Carter of his views about this matter, this question has been receiving some attention in the Department of Justice in various circles. And I may say that it appears to be a pretty serious problem. For that reason, because I am not as free in the conduct of the Government's case on this point as ordinarily Government counsel are, I would prefer to discuss that question with my superiors before undertaking to answer, as to whether or not we should file such a statement.

Your Honor is aware that some of these cases which the defendants cited are cases in which, technically, there is no breach of the secrecy of the grand jury by the Court in releasing the transcript, but there has ben some partial disclosure to the defendants justified by courts because of references made by the Government in argument about the matter to the transcript. And I have tried to be very careful not to say anything. I, too, could speculate at great length, the way the defendants do, about the use made here but I think it is sufficient to point out that it is all speculation and I don't propose to enter into it. And I think, for that reason, the furnishing of such a statement [fol. 1358] as your Honor has suggested might raise some serious question here. And I would prefer to discuss that with my superiors.

The Court: All right, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Correa: May I have just a word, your Honor?

The Court: Well, I don't want to start hearing everybody again. It is now 4:25.

Mr. Royall: Your Honor, I have got to reply to your Honor.

The Court: What have you got to reply to about Mr. Siddall?

Mr. Royall: Something you said, sir, I have got to reply to. I have nothing to reply to these gentlemen, but I have to your Honor. But these gentlemen spoke first, so I am not trying to get in their way. But I will have to have a few minutes.

Mr. Correa: I need only a minute. I am going to resist the temptation to comment on everything that counsel have said with respect to which I could point out inaccu-

racies or differences of approach. I do want to mention two things.

The Court: I was going to suggest that if anything occurs to you gentlemen, now or after you leave here, that you would like to comment on, I have no objection to receiving a letter. After all, I do want all the aid and assistance I can get. This is a very important question. [fol. 1359] I don't want you to think that I underestimate its importance. And I certainly need all the help I can get to decide it properly, as I see it.

Mr. Correa: That would be most helpful to us, if your Honor please, because in the argument we have had—I don't know how many cases have been referred to, and so forth—but the most interesting thing among the so-called new material is, your Honor asked counsel who spoke last to state as to his agreement or disagreement with Wigmore on grand juries. Curiously enough, he started to answer and before I knew it he was talking about Wigmore on informers' privilege.

Now, I have had occasion in other cases to brief extensively this informers' privilege, and there is a lot of law on informers' privilege, and long sections of Wigmore, and many cases, and it is very interesting. Unfortunately, it has nothing to do with the issue before your Honor. The only thing an informer's privilege covers is the identity of the informer, not even the contents of what he has reported. It is based on a policy encouraging voluntary informing to the Government. Many different considerations apply to it and we could have a fine argument about it. But we would still have our problems unresolved. So I mention that only to point out that it has nothing whatever to do——

The Court: Not even by analogy?

[fol. 1360] Mr. Correa: By analogy, sure, almost anything is related to almost anything else by analogy.

The Court: I believe, if I can read Mr. McDowell's mind, he only brought it out to show that sometimes consideration of public policy far outweighs other considerations. Is that what the idea was?

Mr. McDowell: That's right.

The Court: In other words, you don't throw out the

baby with the dirty bath water, is that it? It's the old story again.

Mr. Correa: The one other point which interested me of their argument is this. Counsel for the plaintiff do not disagree, I take it, with the principle enunciated by Wigmore, and by the Rose case, and by the Socony-Vacuum case, and a host of other cases, that where the interests of justice demand it——

The Court: Well, he made it clear that he doesn't think in this case you have shown any cogent reason where the interests of justice demand it. That is what I understood to be their argument.

Mr. Correa: And in what cases would he concede the interests of justice demand it? Well, he said—and I made a note of it—the only cases where grand jury minutes were delivered to the defendant are perjury cases. Now, note the words "to the defendant", because in those cases there [fol. 1361] was a defendant, in the proper sense. The grand jury had indicted somebody and he was the defendant.

We are not, in respect of this grand jury proceeding, the defendant, or the defendants. There is no defendant in the grand jury proceeding. They didn't indict anybody. That is our point. That is the reason we are here.

Now, counsel says—well, we don't call it an abuse of process; and we apparently concede their process is valid.

We don't. As I said this morning, we prescind from that question. All we say is that if they want to try their civil cases, and prepare their civil cases, by using the grand jury, then that must be made subject to the rules that apply to civil litigation. It rests with their choice. They didn't have to use the grand jury. They don't have to use it ever again in preparation.

The Court: They can't get Congress to give them the power of subpoena to investigate. Did you get it yet?

Mr. McDowell: No.

The Court: Do they still put the bill in every year?

Mr. McDowell: (Nods.)

Mr. Correa: But so long as they want to use the grand jury, then, if your Honor please, it seems to me they have [fol. 1362] to take it subject to the ordinary rules that apply for every litigant.

The Court: I understood your problem.
General, did you want to say something?
Mr. Fortas precedes me.

Mr. Royall:

Mr. Fortas: I just have one word, if your Honor will permit me. The Government says the one exception is in perjury cases. Your Honor, the Government is opposed to turning over the transcript of a grand jury's testimony to the defendant, even though it indicted that defendant for perjury in his grand jury testimony.

The Court: They only do it when a judge tells them they have to do it, I realize that. They never want to turn it over. Let's be frank about it. No prosecuting officials ever like to turn over grand jury minutes. They just don't like to do it, because of the sacredness and secrecy of the grand jury. And so it is only with great reluctance that it is done. And I don't say that I quarrel with the public policy of not just lifting the whole thing for everybody to look at. There are many reasons and I know them. I told you I was in the grand jury room for seven years. And I know that big mouths in the grand jury have made lifelong enemies for certain people by saying, "You know who told about you?" That started it.

You have to have a lot of secrecy, I can tell you that. [fol. 1363] I learned it the hard way, Mr. Fortas. I had to be very careful for fear someone didn't say, "You know, that Modarelli fixed you when he got through talking to the grand jury." That was a lifelong enemy for Judge Modarelli from then on. If I ever ran for office I guess they would work very hard to see me elected—out the window.

Mr. Fortas: Your Honor, you know when the question first came up about the disclosure of statements made by the F.B.I. the Government said, "If the courts require us to disclose the statements made to the F.B.I., people will clam up. They won't talk to the F.B.I."

The Court: All those dire predictions that are made—if the Court decides otherwise—never come true.

Mr. Fortas: That is my point.

The Court: Never. I am never frightened by that. I can read you a lovely poem about that.

Mr. Fortas: That is my point.

The Court: If I believed all the things that I have heard since I was born about what was going to happen if, so and so got elected, or this happened, or that happened, I might have committed suicide a long time ago. I don't believe it any more.

Mr. Fortas: Thank you, your Honor.

Mr. Royall: Your Honor, the only reason I arise—and I hope I stick to the subject fairly well—is the remark [fol. 1364] that your Honor made that a witness is supposed to tell the truth every time and you don't see why he needs any refreshment of his recollection, something of that kind.

The Court: I mean the truth about the ultimate fact that he is testifying to. The details are different, I can understand that.

Mr. Royall: Well, I just want to relate this to the Siddall matter, because it is illustrative of what will happen every time we have a witness up.

No one can remember the vast amount of information that has been required in connection, for example, with the search for all these documents. Mr. Siddall was examined about three years ago, three and a half years ago—more than that; about three and a half years ago. He is a man of fine memory, but it would present difficulty to any man to have a detailed recollection. His examination was a detailed examination. There may have been changes in conditions. There may have been additional matters discovered on the search, and therefore it would be quite unjust that he should not have available to him what he said when his recollection was fresh about it.

It seems pretty well established, and the Rose case clearly states, that certainly there can be no harm in a man having his own testimony, no one can be harmed. And he, Mr. Siddall, as well as the company, has asked for [fol. 1365] it. You are familiar with the language in the Rose case.

The Court: Oh, yes.

Mr. Royall: There is no use to give it to you again.

The Court: I have read it enough times and analyzed it.

Mr. Royall: Now, your Honor, it happens that something of that kind has arisen quite a number of times—in the Packers' case; even in the Darling case it arose; and the Rose case, the language there; and the California case—and, therefore, we are confronted with a special reason for those who are to be examined in the case, whether it is on deposition or the trial. And I just wanted to point that out to you in answer to what I took to be an inference that perhaps it was immaterial whether they had their testimony before they were examined about it.

The Court: No, I had in mind certain definite situations that arise where a man, if he is telling the truth, can't tell two stories about it.

Mr. Royall: That's right.

The Court: But certainly a man, a busy man particularly—that includes a busy judge, or a busy lawyer, or a busy business man—cannot be expected to remember countless details in his business. I meet people in the street and they say, "Did you forget that you tried this [fol. 1366] case for me?"

In a little over thirty years at the bar you certainly can't remember every case you tried, no matter how well paid you were.

Many things. People I married say, "You don't remember that you married me?"

"When did I marry you?" "1925."

I married fourteen hundred couples. I can't remember every bride and groom I ever married when I was a magistrate. And they are insulted that I don't remember that I married them.

I realize these things.

Mr. Royall: That is what I was talking about. This is a case of asking him about countless documents, and countless individuals. And when they first had this discovery, back in 1951 and '52, of course he was right up to date on it. He is a very honest man, he is a very conscientious man, but it might make a difference. It puts him on the defensive. If he had that transcript he would certainly be able to refresh his recollection as to what he had said at the time he originally made the search for these documents, which are the same documents under the

grand jury, to a large extent, as they were when they came later in the civil action.

I merely wanted to call that to your Honor's attention, [fol. 1367] and in conclusion to repeat this, that I feel that the argument made by the other defendants is eminently sound, that this case was based, this complaint was drawn, necessarily drawn, in large part, if not entirely, upon what they got before the grand jury, because it came right after that, their discovery was based on the grand jury, their statement of contentions and the issues were necessarily —though they are most incomplete and unsatisfactory from our standpoint, what they say there must have been based on the grand jury. Now, they have had those three and a half or four years, some of it nearly five years, and they have had all that time for preparation of this case. Their preparation has been predicated on that. And we say that common fairness entitles us to that information. We are not playing a game, we are not playing ace in the hole—it may be a deuce in the hole they have got, your Honor, instead of an ace; I rather think it is—but whether it is an ace in the hole or a deuce in the hole, we are entitled to know it.

Thank you, sir.

The Court: Well, ordinarily they would agree with you, but they say this is an antitrust suit—pro bono publico to be considered, right?

Mr. McDowell: Your Honor, may I be permitted two short sentences?

[fol. 1368] The Court: Can I fine you if it is more than two, and will you pay it?

Mr. McDowell: I will pay it, your Honor.

If counsel can say with certainty what he has just said, that this case, this civil case, and all its trappings, came out of the grand jury, then counsel doesn't need the transcript of the grand jury, because he already knows too much.

The Court: You mean by knowing that?

Mr. McDowell: If he can say that with certainty. Otherwise he is engaging in speculation.

The Court: He only deduces that, and infers it, from the fact that not long after the grand jury was discharged

you filed this complaint. And, you know, jurors send people to the chair on inferences.

Mr. Correa: We also deduce it from the Department's press release, if I may say so, your Honor.

The Court: Gentlemen, I want to thank you all. The briefs were excellent and most helpful. And I really do believe that you all tried to help me to render the right decision, as you see it. And I am conscious of the fact that you all have an enlightened interest in your clients, and it may naturally influence your reasoning, there is no doubt about it.

Off the record.

(Discussion off the record.)

[fols. 1368a-1374] [File endorsement omitted]

[fol. 1375] In United States District Court, District of New Jersey

Civil Action No. 1196-52

United States of America, Plaintiff,

vs.

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., Defendants.

On defendant's motions to compel plaintiff to produce grand jury transcripts.

Opinion—filed April 17, 1956.

Appearances:

Raymond Del Tufo, Jr., Esq., United States Attorney, Attorney for Plaintiff, by George J. Rossi, Esq., Assistant United States Attorney; Joseph E. McDowell, Esq., Ray-

mond M. Carlson, Esq., and Daniel H. Margolis, Esq., Attorneys, Department of Justice.

Toner, Crowley, Woelper & Vanderbilt, Esqs., Attorneys for Defendant Procter & Gamble Company, by John A. Ackerman, Esq.

Dwight, Royall, Harris, Koegel & Caskey, Esqs., by Kenneth C. Royall, Esq., H. Allen Lochner, Esq., and Eugene Rossides, Esq.

Dinsmore, Shohl, Sawyer & Dinsmore, Esqs., by Richard W. Barrett, Esq., of Counsel.

O'Mara, Schumann, Davis & Lynch, Esqs., Attorneys for Defendant Colgate-Palmolive Company, by Edward J. O'Mara, Esq.

Cahill, Gordon, Reindel & Ohl, Esqs., by Mathias F. Correa, Esq., and James B. Henry, Esq., of Counsel.

[fol. 1376] Bailey, Schenck & Bennett, Esqs., Attorneys for Defendant Lever Brothers Company, by Alexander T. Schenck, Esq.

Arnold, Fortas & Porter, Esqs., by Abe Fortas, Esq., and William L. McGovern, Esq.

Martin J. Pendegast, Esq., General Counsel, Lever Brothers Company, of Counsel.

McCarter, English & Studer, Esqs., Attorneys for Defendant The Association of American Soap and Glycerine Producers, Inc., by Augustus C. Studer, Jr., Esq.

Davies, Richberg, Tydings, Beebe & Landa, Esqs., by Adrien F. Busick, Esq., of Counsel.

MODARELLI, District Judge.

A grand jury sitting in this district from May, 1951, until November 25, 1952, investigated possible violations of the anti-trust laws in the soap and synthetic detergent industry. The firms under investigation included the four defendants in this civil action: The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc. No indictment was returned.

On December 11, 1952, the United States filed its complaint in this action.[1]

[fol. 1377] Now before the court are defendants' motions for an order compelling plaintiff to produce and permit the inspection and copying by the defendants of the transcripts of the testimony of all witnesses who appeared before the grand jury.[2] There are two issues:

(1) Whether the ends of justice require the court to exercise its discretion under Rule 34 to order plaintiff to produce and permit the inspection and copying by the defendants of the transcripts of the testimony of all witnesses who appeared before the grand jury.[3] (2) If the ends of justice require production, whether there is any reason for maintaining the secrecy of the transcripts.

The Supreme Court has stated the lofty purpose of dis-

---

[1] The action was commenced under § 4 of the Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C.A. § 1 et seq., for alleged violations of § 1 (conspiracy in restraint of trade), and § 2 (conspiracy to monopolize any part of trade) of the Act. In general, the offenses charged are that since 1926 defendants have been engaged in a conspiracy in unreasonable restraint of and to monopolize trade in the production and sale of soap and synthetic detergents, and the three manufacturing defendants have continuously monopolized that trade. Plaintiff asks that defendants be enjoined from continuing their alleged offenses and that each of the manufacturing defendants be dissolved into independent organizations.

[2] Alternative motions are for an order compelling plaintiff to produce the transcripts of those witnesses who consent thereto.

[3] In *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 233, 234 (1940), the Court stated: "* * * Grand Jury testimony is ordinarily confidential. See Wigmore, *supra*, § 2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. * * *." Rule 34 requires a showing of "good cause" for the production of documents. Surely, if the ends of justice require disclosure of the grand jury testimony, that is good cause for the production of the transcripts.

covery which this court has followed[4] and will continue to follow in approaching its consideration of the first issue:

> "* * * Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. * * *." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

[fol. 1378] The very substantial contention of defendants is that plaintiff has used the facts contained in the transcripts to gain an unfair advantage over defendants who have been unable to use these facts in preparing for trial. They argue that justice, as implemented by the broad discovery rules,[5] entitles them to use these transcripts. As a result of that persuasive contention and because this is a "Big Case"[6] involving serious, complex, and unique procedural problems, during the oral argument of these motions the court asked Mr. McDowell, plaintiff's attorney, the following questions:

> "Mr. McDowell, do you object to submitting a detailed affidavit stating exactly (a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial." (Transcript, December 12, 1955, pp. 6-7.)

---

[4] See the description in the Appendix of the unusual procedure used in this case.

[5] See rules 26 to 37. And Rule 1 requires this court to construe the Rules "* * * to secure the just, speedy, and inexpensive determination of every action."

[6] The label now is synonymous with Sherman Act cases commenced by the United States against multiple defendants. See "The Big Case," 64 Harv. L. Rev. 27 (1950). The magnitude of this case is described in the Appendix.

He wished to confer with his superiors in the Department of Justice before deciding if he would answer the questions. The court awaited candid answers—but in vain. For Mr. McDowell wrote:

> "The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

His "statement" at the hearing did not answer the ques- [fol. 1379] tions. Because the plaintiff arbitrarily has refused to answer the court's questions relating to any use of these transcripts, the court has been denied helpful information and as a result has been forced to seek its answers elsewhere.

The Department of Justice, plaintiff's representative in the courts, believes that under the law it has the right and duty to use the grand jury to enforce the anti-trust laws through criminal proceedings, civil actions, or both.[7] This

[7] See discussion at pp. 3-4 of the appendix. Additional evidence of the Department's interpretation of the law is a statement by the Assistant Attorney General in charge of the Antitrust Division of the Department: On May 12, 1955, he appeared before the Special Antitrust Subcommittee of the Judiciary Committee of the House of Representatives; he stated:

> "Finally, I suggest you may wish to consider means available to the Department for compelling production of data before a complaint has been filed in a civil procedure. At the present time in the investigation of civil matters, the Department must
>
> "(a) depend upon the voluntary cooperation of those under investigation;
>
> "(b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or
>
> "(c) make use of the grand jury.
>
> "Those are alternatives.
>
> "From this it seems clear that the sole means for com-

[fol. 1380] is plaintiff's policy, and although its legality is not now in issue, was it followed during the grand jury investigation of these defendants?[8] On the day the complaint was filed, the Department issued its usual press release, which included the news that "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings." There was a basis for that statement. An affidavit filed by Mr. McDowell in support of certain omnibus motions under Rule 34[9] indicates that the plaintiff considered its motions as requests for supplementary discovery to add to information previously obtained both from documents

---

pelling pre-complaint data in civil cases is the grand jury. Some—and I refer to lawyers there primarily—have urged that such use of the grand jury constitutes an abuse of its processes.

"Mr. Maletz. Do you agree with that position, Judge?

"Mr. Barnes. I do not.

"The Chairman. I am glad to hear you say that.

* * * * * * *

"Mr. Harkins. In that conection, under the Sherman Act, you can use a grand jury to get evidence solely for a Section 4 injunction proceeding, can you not? There is no abuse of using the court's process to convene a grand jury to secure evidence for you solely in a Section 4 proceeding?

"Mr. Barnes. No, I do not think there is any abuse of it."

(The colloquy appears in Colgate's Brief, pp. 13-14; its source is the transcript published by the Bureau of National Affairs, Inc., at p. 350.)

[8] If the policy was followed, it is reasonable to conclude that plaintiff has used and will continue to use the transcripts during its preparation for trial; the only other conclusion would be that plaintiff has adopted a useless policy. Furthermore, would plaintiff so vigorously have argued the legality of its multiple use of the grand jury unless in this case it had used the transcripts?

[9] See discussion in the Appendix beginning at p. 7.

and testimony during the grand jury proceedings. Additionally, a previous opinion in this case is pertinent:

> "* * * Government's counsel stated in affidavit form that the purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them, or of any other Federal anti-trust laws, and, second, determination as to what action should be taken to enforce those laws through criminal proceedings, civil proceedings or both. He further stated that the investigation and all proceedings incident to it, including the grand jury proceeding, were begun and carried on pursuant to and within instructions to accomplish those purposes. * * *." *United States* v. *Procter & Gamble, et al.*, 14 F.R.D. 230, 233 (D.C. N.J. 1953).

The evidence before the grand jury, of course, consisted both of documents and testimony, whereas the motions now before the court relate only to the testimony. But none of [fol. 1381] the evidence as to plaintiff's policy and use of the transcripts indicates that plaintiff is disregarding grand jury testimony.

The court is not completely informed about plaintiff's use of the transcripts, however, because plaintiff's silence as to the extent of its use is not overcome by any evidence similar to that which has enabled the court to decide that plaintiff has used and will continue to use the transcripts during its preparation for trial. As to what use plaintiff plans for the transcripts during the trial itself—subject to the law of evidence—although the court once again is confronted by the lack of answers to its questions, since the case only is in its discovery stage the issues involved are not now before the court.[10]

---

[10] During the trial of *United States* v. *Grumstein & Sons Company*, 137 F. Supp. 197, 203 (D.C. N.J. 1955), a civil action, an opinion was filed ordering plaintiff to produce the transcripts of the grand jury testimony of "* * * (1) the defendants, who represent that they will take the stand in their own defense, and of (2) any other witnesses before such Grand Jury, who will definitely take the stand at this trial, as soon as such fact definitely appears."

The fact that plaintiff has used and will continue to use the transcripts while preparing for trial is perhaps sufficient reason why the ends of justice require production of the transcripts for defendants' use. But equally important is the extent to which defendants will be aided by such production. The testimony contained in the transcripts is unknown to the court. But plaintiff has never contended it is irrelevant to the issues in this case. Indeed, such a contention would be disingenuous in view of the fact of plaintiff's use of the transcripts. Any relevant information, not privileged, which is the scope of the pretrial discovery mechanism established by Rules 26 to 37, has "* * * [fol. 1382] a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.'" *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). Thus, the transcripts would be useful to defendants during their preparation for trial.

Clearly, the ends of justice will be attained by plaintiff's disclosure of the grand jury testimony, and defendants have shown good cause for the production of the transcripts. But, plaintiff argues, if defendants inspect and copy the transcripts, it would violate their traditional secrecy.

Any discussion relating to the secrecy of grand jury transcripts begins with *United States* v. *Rose*, 215 F. 2d 617 (CA 3, 1954). There the court summarized, at page 628, the reasons generally given for the rule of secrecy:

> "* * * (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses

who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

[fol. 1383] Do any of those reasons apply in this case? The grand jury having been discharged without returning an indictment, (1) and (2) clearly do not apply; (5) also is not applicable for the very corporations who were being investigated have moved for production of the transcripts. As to (3), the court agrees with Judge Hartshorne's opinion in *United States* v. *Grunstein*, *supra*, at p. 201:

"* * * this same reason applies to every possible witness known to one party in a civil proceeding, whose name is desired by the other, a form of discovery clearly requisite. For the Federal Rules of Civil Procedure are based on the conclusion, that this possibility is not as great a danger as is the danger of surprise, which habitually resulted previously, when such discovery was generally refused. That this conclusion is sound, is fortified by the fact that the party who already knows of this witness can, by these very same discovery rules, see that this witness' story is not tampered with, by having his depositions taken and sworn to, before he is subjected to any such possible pressure from the other side."

As to (4), *United States* v. *Socony-Vacuum Oil Co.*, *supra*, *United States* v. *Grunstein*, *supra*, and 8 *Wigmore, Evidence*, § 2362 (3d ed. 1940) are persuasive authorities that after the grand jury has been discharged, the temporary guarantee of secrecy ends and disclosure is proper. If the rule were otherwise, it would create an opportunity for abuse by a corrupt witness who could testify falsely without fear of his lies being revealed to public scrutiny and reaction.

Thus, none of the reasons for secrecy of the transcripts applies in this case.

The court indicated during the oral argument that the many criminal cases cited by plaintiff which involved special circumstances for maintaining secrecy properly were distinguishable from this case. Subsequently, *United States* v. *Grunstein, supra*, was decided, wherein the court also distinguished the cases where the defendant's sought produc- [fol. 1384] tion of the transcripts in order to attack the validity of the indictment.[11] The defendants in this civil action seek the transcripts for discovery purposes.

Judge Learned Hand's remark in *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D. N.Y. 1923) is often quoted:

> "* * * no judge of this court has granted it [motion for inspection of the grand jury minutes] and I hope none ever will. * * *."

It was a criminal case in which defendants moved to quash the indictment and at the same time they moved to inspect the grant jury minutes. In his opinion, Judge Hand first denied the motion to quash, then he denied the motion to inspect. The full text of the portion of the opinion relating to the motion to inspect clearly shows that his remark cannot be applied in this case.[12] *United States* v. *Henry S.*

---

[11] *Shushan* v. *United States*, 117 F. 2d 110 (CA 5 1941); *United States* v. *Papaioanu*, 10 F.R.D. 517 (D.C. Del 1950); *United States* v. *Oley*, 21 F. Supp. 281 (E.D. N.Y. 1937); *United States* v. *Herzig*, 26 F. 2d 487 (S.D. N.Y. 1928); *United States* v. *Morse*, 292 Fed. 273 (S.D. N.Y. 1922); *United States* v. *Silverthorne*, 265 Fed. 853 (W.D. N.Y. 1920); *United States* v. *Gouled*, 253 Fed. 242 (S.D. N.Y. 1918); *United States* v. *Rubin*, 214 Fed. 507 (D.C. Conn. 1914); *United States* v. *Violon*, 173 Fed. 501 (C.C. S.D. N.Y. 1909).

[12] "Finally, the defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible, move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. U. S. v. Violon (C.C.) 173 Fed. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is

[Vol. 1385] *Morgan, et al*, Civil Action No. 43-757, S.D. N.Y., also is not persuasive authority for there was no opinion setting forth the court's reasons for denying the defendants' motion for production of the grand jury transcripts; moreover, the court in that case orally admitted that perhaps "* * * I have been unduly affected by that statement of Judge Learned Hand. * * *"[13]

In *United States* v. *General Motors Corp.*, 15 F.R.D. 486, 487, 488 (D.C. Del. 1954), the court denied the defendant's motion under Rule 34 for production of the grand jury transcripts. The court having found no reported case in which a defendant requested in a civil action production of the transcripts under Rule 34, it decided the question "* * * on general principles of long standing, designed to protect and preserve the efficacy of our Grand Jury system." One of the general principles which the court relied upon was that although discovery under the Rules is of extensive scope, it "* * * must be halted when it attempts to invade ground reserved for loftier reasons than thoroughness of preparing one's case on the civil side of the court. * * *." The court decided that protection of the grand jury process was a loftier reason: "* * * The effect on subsequent proceedings, on jurors, on witnesses, on the privacy of the system itself, is of greater moment * * *."

---

held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men; but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

[13] Transcript of Hearing filed December 31, 1948, p. 192.

This court will not follow that decision, and for two reasons, viz., the opinion does not indicate that the court considered whether plaintiff used the grand jury transcripts in connection with the civil action; and that court mainly relied upon criminal cases wherein the refusal to order production of the transcripts was for reasons not present in this case.

[fol. 1386] The question to be resolved here by the four motions presents an unprecedented vexing problem, since practically all cases dealing with the subject matter concern cases decided under Rule 6(e) of the Federal Rules of Criminal Procedure. Here, the applications to inspect and copy the grand jury transcripts are brought under the discovery provisions of the Federal Rules of Civil Procedure. I realize there is a strong caveat against the needless intrusion upon the indispensable secrecy of grand jury proceedings. The reasons therefor were indelibly impressed upon me when I served as Assistant Prosecutor of my home county for ten years where I spent the greater part of the time presenting cases to the grand jury. I realize further that a strong and positive showing should be required of persons seeking to break the seal of secrecy, which never should be done except in extreme instances to prevent clear injustice or an abuse of judicial processes. Which policy should be served here to bring about justice—the policy requiring secrecy, or the policy permitting disclosure for discovery purposes only in the interest of justice? I believe the requirement of secrecy in this case can be safely waived and the minutes of the grand jury divulged within the limits prescribed by the law, and that the failure to do so would be an abuse of discretion and not in the furtherance of justice. Under Rule 6(e) of the Federal Rules of Criminal Procedure our courts have, by way of interpretation, extended their jurisdiction so as to remove "the veil of secrecy" around grand jury proceedings where, in the court's discretion, the furtherance of justice requires it. If it can be done on the criminal side, I can see no compelling reason why it cannot be safely done on the civil side in this case. I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could [fol. 1387] obtain it by pursuing a different remedy. These

motions were considered by me objectively and honestly by setting aside all my preconceived ideas on the subject.

The court concludes that since plaintiff is using the transcripts containing relevant information, the ends of justice require the court to order plaintiff to produce and permit the inspection and copying by defendants of the transcripts; equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial; none of the reasons for the rule of secrecy applies.

An order may be submitted in conformity with the opinion herein expressed.

[fol. 1388] APPENDIX

In its opinion granting the defendant's motions to compel the plaintiff to produce the grand jury transcripts, the court referred to the serious, complex, and unique procedural problems involved in this case. A discussion of those problems will show their relationship to defendants' motions as well as explain the references in the opinion to other phases of this case. Also, judges and lawyers who in future years will be involved in protracted anti-trust cases—a "Big Case"—will be aided by a description of the unusual procedure successfully used in this case during the normally gruelling Battle for Documents.

When the plaintiff filed three omnibus motions under Rule 34, designating by category descriptions the types of documents sought from the three manufacturing defendants, the court studied the lengthy descriptions. It would have been impossible to decide intelligently the issue, viz., whether plaintiff's asertion of "good cause" for the production of the documents was outweighed by defendants' assertion that additional production would force them to undergo an unreasonably disruptive and expensive file search. The court also was greatly concerned about plaintiff's failure to reveal sufficient relevant facts which it had discovered from defendants' earlier production of documents. By suggesting a procedure the court hopefully anticipated that if plaintiff would reveal its facts, defendants would consent to produce some documents, thereby limiting plaintiff's requests for documents in a greatly

modified substitute motion. Happily, to date it appears that plaintiff's motions are or will be entirely neces- [fol. 1389] sary.[1]

A detailed discussion of most of the litigation events which have occurred in this case is required to understand counsel's arguments as well as the court's solution of the serious and recurrent problem concerning the production of documents in a protracted anti-trust case.

March 6, 1953, plaintiff filed the first motion. It was for an order requiring defendant Procter to produce documents under Rule 34, "* * * and permit the plaintiff to inspect and remove from the custody of the Clerk for the purpose of copying * * * certain documents identified by numbers affixed thereto by defendant, such numbers being listed in Exhibit 'A' attached thereto. * * *." The docu-

---

[1] April 19, 1955, was the happy day on which all counsel appeared in court and presented consent orders covering all of the Rule 34 motion, except documents relating to market position. Counsel's comments regarding the effectiveness of the procedure which resulted in the consent orders encouraged the court to write this description. For example, Mr. Kramer, counsel for plaintiff, said: "* * * your honor came up with not only a highly ingenious suggestion for cutting the Gordian knot of the battle of the papers, but also the suggestions proved to have been quite fruitful, I think, from the Court's point of view and, I am sure, from that of all the parties. Every one has had to give up something, but in the process I am sure that the Government has learned a great deal about its case, and about the way in which to operate cases of this size. * * *." Mr. Royall, counsel for Procter, agreed with Kramer "* * * as to the benefit that every one has derived from the procedures which your Honor suggested. * * *." Mr. Fortas, counsel for Lever, expressed "* * * my appreciation, as a member of the Bar and as one of the counsel in this case, to your Honor for devising this procedure, which I believe has worked out very satisfactorily, thanks to your Honor's order and to the cooperation among all counsel. I believe that the years to come may show that this has been a significant contribution to anti-trust procedure."

ments were designated by numbers assigned by Procter prior to the production of the same documents in compliance with three grand jury subpoenas.[2] Since the docu- [fol. 1390] ments had been returned to Procter, plaintiff's motion was a necessary procedural move. In opposition to the motion, Procter's principal arguments were that plaintiff failed to show the good cause required by Rule 34, and that plaintiff had abused the process of this court. The substance of the first argument was that "* * * since plaintiff has had possession of the great bulk of Procter documents now asked for a year and a half and has made copies and notes, though improperly, of selected papers, it would seem obvious that plaintiff is already in possession of the information sought and has no cause for production under Rule 34." As to the second argument, "* * * the Government abused the process of the Court by using criminal subpoenas before a Grand Jury in order to prepare for this civil action. * * * Accordingly, this Court should redress the wrongs done to Procter by reason of the abuse described and, by dismissing this motion, should see to it that the Department of Justice in this case and in future cases will take no benefit at all from misusing the Grand Jury process."[3] A further argument was that since proceedings before the grand jury are ex parte, the effect of plaintiff's conduct is that in this civil case plaintiff has obtained ex parte discovery contrary to the mutuality nature of the prefrial discovery rules. In support of its motion to produce documents, plaintiff argued that "* * * Defendant cannot say that the documents which it was ordered to produce [by Judge Forman during the grand jury investigation] because of their relevance to the descriptions of violations made in the argument [before Judge Forman] are not equally relevant to the allegations

---

[2] Two subpoenas were served in May, 1951, and one in June, 1952. Motions to quash the former were extensively argued before Judge Forman, who modified their scope.

[3] According to Procter, plaintiff's use of the grand jury subpoena to obtain facts upon which to base a civil complaint was an abuse of process which can be prevented only by denying plaintiff a second look at the documents.

of the complaint. Neither can it say that documents which [fol. 1391] were needed to determine the existence of such possible violations are not now needed to establish the allegations in the complaint." As to Procter's argument regarding the misuse of the grand jury process, according to plaintiff "* * * the investigation [grand jury] was begun and carried on with both criminal enforcement and civil enforcement in mind. The purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them, or of any other Federal antitrust laws, and, second, determination as to what action should be taken to enforce those laws through criminal proceedings, civil proceedings or both. * * * Because the Sherman Act's Section 4 by virtue of which civil actions may be brought, is an ancillary section, dependent, as Judge Carpenter stated * * *, [United States v. Swift, 188 Fed. 92, 196 (D.C. Ill. 1911)] upon the criminal sections, it is difficult to see how any investigation could ever be begun with the sole purpose of bringing a civil case."[4] Plaintiff believed that a Section 4 action could not be commenced until a determination had been made that there had been a violation of the criminal sections, that whatever other action is taken by the Department of Justice, the preliminary determination must be that there has been a violation of the criminal sections of the Sherman Act.[5]

May 11, 1953, this court filed its opinion granting the [fol. 1392] motion, *United States* v. *Procter & Gamble, et al*, 14 F.R.D. 230, deciding that plaintiff properly sought production of the documents "* * * anew in this cause

---

[4] Plaintiff also argued that since the dependency of § 4 upon §§ 1, 2 and 3 requires a determination as to whether there has been a criminal violation before a civil action can be commenced under § 4, it would not be an abuse of process to undertake grand jury proceedings with the *sole* purpose of preparing for a civil case under § 4.

[5] "* * * It [United States] couldn't bring a Section 4 Sherman Act civil case unless it had determined to its satisfaction that there had been violations of the criminal portions of the law."

to avoid the objections voiced by defendant's attorney, rather than depend upon previous possession in the criminal action."[6] As to the abuse of process argument, this court was unwilling "* * * to criticize this procedure [the multiple purpose—criminal, civil, or both—use of the grand jury] by a refusal to allow production of the documents requested." As a result of the skirmish between plaintiff and Procter culminating in this court's order to produce the documents, on plaintiff's application on July 14, 1953, this court also ordered the other three defendants to produce certain enumerated and described documents "* * * the United States desiring these documents [the same as those produced before the grand jury] for use in the present action as though they had been produced by Lever [and Colgate and The Association] pursuant to motion and order under Rule 34 * * *." On the same day there was a stipulation for inspection and copying by defendants of certain "third person" documents. The defendants had sought permission from plaintiff to inspect and copy documents possessed by plaintiff's attorneys for use in trial preparation and which were obtained from and were records of persons, firms or corporations who are not parties in this action ("third persons"); the stipulation resulted when thirty-seven of the third persons did not object to defendants' inspecting and copying the documents.

June 4, 1953, Procter filed two motions: For the "Return of Copies and Other Writings"[7] and to "Suppress [fol. 1393] certain Documents."[8] One of Procter's two

---

[6] Mr. Royall, Procter's attorney, had vigorously argued that during the criminal proceedings the documents were illegally obtained, thus they could not be used or ordered produced in this civil action.

[7] Copies of the documents; excerpts from and all notes, analyses, summaries and other writings concerning the documents.

[8] (1) Documents submitted by Procter to the grand jury and listed in plaintiff's motion dated March 6, 1953; (2) copies of, excerpts from and all notes, analyses, summaries

principal contentions in support of its first motion was its previous contention relating to the abuse of grand jury process. Procter also contended that "* * * Judge Forman, during the hearings on the motions to quash the said subpoenas duces tecum, ruled that the documents to be submitted should be retained in rooms provided in the Federal Building, Newark, New Jersey, and counsel for the Government acquiesced. Nevertheless, in violation of this ruling, as we contend, counsel for the Government caused copies and notes, etc., of certain of the said documents to be made and to be taken to Washington, D. C., where they would normally have been handled or seen by persons not directly concerned with the Grand Jury proceedings."[9] Procter's contentions in support of its second motion included all of its previously discussed arguments regarding plaintiff's motion for the production of documents.[10]

January 14, 1954, this court denied Procter's two motions. Absent any authority, the court was reluctant to erect an "* * * insurmountable obstacle to any civil

---

and other writings concerning any of the documents; papers, documents and other like evidence obtained directly or indirectly by reason of information or knowledge derived wholly or partially from (1) and (2). Procter also included in the motion any documents, etc., obtained by plaintiff during the grand jury proceedings from any of the other defendants, and any documents, etc., obtained from any source other than defendants.

[9] Royall's affidavit dated June 4, 1953, p. 2.

[10] The only effective remedy, argued Procter, for plaintiff's conduct is to prohibit plaintiff's use of the documents. Plaintiff again argued: "* * * Section 4 of the Sherman Act, the section under which the instant civil action was brought, is simply an ancillary provision to Sections 1, 2 and 3 which establish and define crimes. *The civil action may be brought only 'to prevent and restrain violations' of the Act's criminal provisions.* (15 U.S.C.A. § 4). * * *."

[fol. 1394] action * * *," which probably would have resulted if the motion had been granted."

August 23, 1954, plaintiff filed the three omnibus motions under Rule 34 for production of documents by the three manufacturing defendants, and on September 24, 1954, amendments were filed. Two of the three motions were eleven pages in length, one was ten pages. For example, plaintiff demanded the following categories of documents from Procter: Profit and loss statements and balance sheets; records or work books showing monthly estimates of departmental expenses and profits and losses; published price lists; sales records; records or work books showing prices, various costs and profits; market surveys, charts, tables and schedules, memoranda and correspondence showing production, sales, purchases, promotional expenditures, inventories, prices, costs, profits; licences, sublicences or other contracts concerning patents; memoranda or correspondence relating to certain patents, negotiations for the procurement of certain materials, construction of facilities by the supplier of certain materials, processing of certain materials; with respect to the production of

---

"* * * the proper remedy is not the granting of this type of motion, which would probably result in an insurmountable obstacle to any civil action, but by a direct attack at the outset of the criminal investigation. Indirect deterrence does not outweigh enforcement of the anti-trust laws. If the court were to grant these motions, would if not, in effect, forever bar a civil action? And would not the principle of law be that where documents are produced by a party pursuant to a subpoena duces tecum for consideration by a grand jury and thereafter the documents returned, no indictment having been found, as was the case here, and subsequently a civil action is commenced by the United States against the same party and the same documents are produced pursuant to Rule 34, that nevertheless the United States must deliver to that party its 'work product' based on the documents and all evidence therefrom must be suppressed. There is no authority or precedent for such a proposition, nor does this court believe that should be the law." (The opinion has not been published.)

[fol. 1395] synthetic detergents, production schedules and estimates, analyses and estimates of base material requirements, sales estimates, and plans, and all memoranda and correspondence relating thereto; contracts with sellers of certain products, memoranda and correspondence relating to price changes and other price data; market surveys, tabulations, memoranda and correspondence relating to shelf prices charged by retailers; records and contracts relating to purchases of tallow or grease during certain periods; memoranda and correspondence relating to purchases of tallow or grease; memoranda and correspondence relating to the termination of the "official New York market price" for tallow or grease, and to the criteria in determining their price; tri-party contract establishing brand quotas or other limitations on advertising and promotional expenses entered into by Procter, Colgate, and Lever in or about January 1938, and all reports, memoranda and correspondence relating thereto; records showing total advertising expenditures and brands sales promotion for each braind; sales division expenses records; memoranda and correspondence relating to the discontinuance or limitation by the three manufacturing defendants and/or any other manufacturer of 1¢ or other special sales, special factory packs, premiums, or special advertising allowances; competitive activity reports; promotional records of various sales units market surveys, tabulations, charts, memoranda and correspondence relating to the planning and conduct of certain promotional couponing campaigns; records showing sales by product categories as reported to the defendant Association; records showing sales and shipments by product categories as submitted to the Bureau of Census of the United States Department of Commerce; records showing sales by brands; records showing sales of various products by dollar amounts; records showing sales of glycerine; memoranda, correspondence, and reports relating to comparative washing tests and detergent evaluations of any brands of other companies; memoranda and [fol. 1396] correspondence relating to negotiations for the purchase of rights to the product "Glim" from the General Aniline & Film Corporation.

Defendants' lengthy briefs and affidavits in opposition to the three motions greatly interested the court in the

procedural problems of a "Big Case."[12] The court's research and its own ideas resulted in a suggested procedure which was read to counsel during the oral argument:

> "Of course, I am happy to note that both sides agree with my opening remarks in an attempt to focus the problem of revealing more specifically the facts upon which the Government bases its case.[13] I have some suggestions. If you will bear with me, it may be productive of some good. I hope it will be. So far we have gotten off to a pretty good start and there is indication of a spirit of cooperation.
>
> "Now, I have a suggested manner of procedure. I thought I would give it to you before lunchtime so you gentlemen can think it over and see whether or not you

---

[12] For example, Mr. Siddall of Procter swore that his company already had produced twenty-two full filing cabinet drawers, containing in excess of 50,000 pieces of paper, books, and other corporate records; he estimated that thus far the cost involved in the search of files exceeded $175,000, exclusive of all legal expenses and that the search would require the full or part time services of more than 100 employees of the company for a substantial period of time and the direct and indirect expense to the company, apart from the interference with the normal conduct of its business, would be $60,000. Mr. Pollock of Colgate swore that production of documents under six paragraphs alone would exceed the total production of 45,000 pages under the three grand jury subpoenas. Mr. Kissner of Lever swore that the motion, if granted, would require Lever to examine 200 file drawers and 1,200,000 papers, and two paragraphs of the motion would require it to produce 300,000 documents.

[13] The court's opening remarks were, in part, prompted by Judge Prettyman's comments at the Symposium of the New York State Bar Association Section on Antitrust Law, held on January 24, 1951:

> "* * * a trial is for the determination of issues; issues are disputes; a dispute must concern a known subject; to be justiciable, the positions of the parties upon the subject must be known; to be persuasive, evidence must be understandable and definitive."

think this is as good as I think it is. I will concede [fol. 1397] that many of you attorneys in this case know more about antitrust litigation than the Court will ever know.

"I will, of course, limit discovery to documents which are relevant to the issues in the case. That's difficult because we don't have the issues yet.

"The pleadings have not particularized the issue. Thus it is the job of the Court and counsel to do it as soon as possible.

"The parties should agree upon a statement of the issues, but if that is impossible they may submit to the Court their proposed statements, which will always be subject to any necessary amendments.

"When the issues have been defined, the plaintiff, in accordance with Mr. Barnes' promise, should relate to the issues and specify the documents it intends to rely upon to prove those issues.

"As to the period of time for which discovery will be allowed at this time, no document relating to conduct later than December 11, 1952, I believe, should be produced—December 11, 1952.[14] Any conduct of the defendants subsequent to that date, on which the complaint was filed, may be relevant to the problem of the remedy if the defendants are liable, but such post-complaint conduct is not relevant to the liability phase of this case, in the Court's opinion.

"Plaintiff has complained of an alleged condition existing prior to that date, a combination-conspiracy-monopolizing brought about by an alleged course of conduct occurring prior to that date. By its very contents a complaint of this sort looks to the past, complains of the past, and says because of the past, laws have been violated.

"Since the complaint alleges a conspiracy and a monopolization, however, as a matter of substantive law at the trial it may be necessary for the court to consider the impact of the defendants' conduct upon actual or potential competition. And if that is the case, per-

---

[14] Plaintiff later consented to limit its motions for discovery to documents pre-dating the complaint.

haps evidence of competitive activity, or the lack of it, would be significant. 65 Harvard Law Review, 1079. "As to plaintiff's desire to search into antiquity, since plaintiff has alleged that defendants have formed a combination and conspiracy, proof of it is, of course, [fol. 1398] essential to the plaintiff's case, so that documents, however ancient, relating to the alleged formation, are properly within the scope of the case. The rub here, however, is in the breadth of the word 'relating', which always causes a great deal of trouble, there being no document labeled 'Combination and Conspiracy Agreement.' But conduct alleged to have been pursuant to the alleged combination and conspiracy may have occurred so many years ago that proof of it will not aid the Court in deciding whether or not any unlawful results have occurred. The distinction here is between evidence of conspiracy and evidence of conspiratorial conduct, the latter presenting the familiar quantitative problems of cumulative evidence and bulk, which counsel must earnestly strive to limit, both for the benefit of the Court and their clients.

"The test for each category of documents sought is, of course, relevancy. But in this case we should add the words 'and necessity.' Plaintiff must show not only that it needs the documents for purposes of its trial preparation, but also that it needs them at this time. Has plaintiff completed its analysis of documents previously produced?

* * * * * * *

"Furthermore, it appears that at least one discovery order has not yet been fully compiled with. According to the brief of Lever Brothers, 'The parties have been and currently are engaged in carrying out' a discovery order entered on July 14, 1953, pursuant to which Lever Brothers transmitted documents to the plaintiff as late as September 28, 1954. Since documents were produced only two weeks ago, plaintiff must show not only that the documents designated in the current motion are relevant to the issues, but are

needed at this time by the plaintiff's attorneys. Is their work schedule so arranged that they will be able to examine these documents at this time or in the foreseeable future?

* * * * * * *

"The Court hereby sets forth some ideas for keeping this case within reasonable, workable bounds, if that can be done in an antitrust case: (1) It is absolutely necessary to eliminate from plaintiff's discovery efforts any documents which are cumulative, repetitive, and in the nature of housekeeping papers. (2) One method by which the volume of documents might be reduced would be for the defendants to produce samples or statistics for representative years, then after analysis, plaintiff, if it desired to rely upon those samplings, would stipulate with defendants that it is a sample which is representative, if, in fact, such is the case. Or the Court could order production of the sampled documents upon plaintiff's showing of necessity. (3) In order to create issues of fact, obviously plaintiff must reveal more facts. For example, the complaint alleges that defendants have attained, maintained, augmented, and exploited "dominance over [fol. 1399] all other purchasing and selling principal materials used in the production of synthetic detergents. To such allegations of conclusions we must apply questions—How, when and by whom was it done? How did defendants achieve their alleged dominance? 'By mergers and acquisitions,' alleges the plaintiff. To which may be asked the question: When and by whom?

"Or plaintiff alleges, 'It was done by controlling, fixing, regulating and manipulating prices, terms and conditions of sales, and promotional activities,' as to which the natural question might be: How? Plaintiff alleges, 'By exchanging information.' But it may be asked: When?

"Frankly, plaintiff should state the evidence upon which it intends to rely. Perhaps this could be done by answers to interrogatories pursuant to Rule 33 * * *.

"(4) The parties should enter into stipulations as to undisputed facts or facts not subject to justifiable

dispute. Rule 36 pertaining to admissions might be usefully employed here.

"(5) Defendants might produce summaries of documents, keeping the originals readily accessible upon demand.

* * * * * * *

(Transcript, pp. 41-46.)

Plaintiff not only "* * * welcome[d] your Honor's indication that you do not consider the material relating to the post-complaint matters as being relevant to these issues. I think that in itself will help a great deal." but also stated that it was willing to modify its lengthy motions.[15] Since the court's many oral suggestions required careful analysis by and conferences among all counsel, there was an adjournment of further argument on plaintiff's three motions.

October 22, 1954, the court in a letter to counsel made suggestions to guide them for the next hearing:

> [fol. 1400] "Plaintiff requires documents to properly prepare its case. Since plaintiff's motion for discovery under Rule 34 is before the court, the designation of documents therein will be our guidepost. I was persuaded during plaintiff's argument at the hearing on October 14, 1954, of the great physical and financial burden to the defendants involved in producing the requested documents, so that now we should concentrate on the significance of the documents. There should be a showing by the plaintiff that its work schedule will enable its attorneys to use the documents, especially since it appears that some documents are currently being produced pursuant to prior discovery orders and agreements, which have not been examined yet by the plaintiff.
>
> "Prior to hearing argument on the motion, the court will hear counsel on the following matters:
>
> "1. A proposed modus operandi worked out by both sides, including a tentative time-table for production of documents and for pretrial conferences.

---

[15] Properly, counsel for Lever was greatly disturbed at such an indication of plaintiff's "undigested requests" for documents. (Transcript, p. 56.)

"2. Can counsel agree upon a statement of the issues?
"3. It appears that when plaintiff is ready to reveal more facts upon which it will rely, then defendants will not object to producing documents pertaining thereto. At this time, is it unreasonable to ask plaintiff what facts it has determined from the many documents already produced? Is the case ripe for a statement of facts by plaintiff? If not, when?
"4. Since plaintiff welcomed the court's discovery limitation (transcript p. 52) and said that it will voluntarily withdraw and limit certain portions of its motion, is it prepared to do so? If so, how?
"5. If counsel have not agreed as to the cut-off date limiting plaintiff's period of inquiry, I shall hear argument thereupon.
"6. Assuming plaintiff does not seek 'housekeeping' documents, plaintiff should define the word.
"7. Have counsel agreed to the production of sample documents, statistics, and summaries?
"8. Have counsel agreed whether documents relating to industrial products are relevant?
"9. Are not the words 'relating,' 'concerning,' 'referring to,' 'showing,' which are used throughout the motion papers properly subject to at least two interpretations, viz., the document is sought if (a) within its four corners it evidences the designated subject, or (b) there is a relationship between the document and the designated subject. Which interpretation is intended by plaintiff?

[fol. 1401] "10. Have counsel entered into any stipulations of fact?

"While I encourage counsel to take positions on many points, no one should fear that subsequently he will not be permitted to modify them. In our 'Big Case' there will be no arbitrary rules binding the parties to any positions taken up to keep the case in manageable shape.

"Finally, defendants have emphasized their need for plaintiff to reveal the documents and facts upon which it will rely, relating them to the issues. The argument appears valid in that unnecessary trial adjournments on the grounds of surprise might thereby be avoided.

But do the defendants need such information at this stage of the case? If and when the need is shown, will plaintiff be ready to comply?"

The hearing was set for December 7, 1954. Meantime, all counsel had conferred five times and had submitted reports to the court. As a result, the court was able to determine the remaining areas of contention regarding the still pending plaintiff's motions for the production of documents. Again, the court's opening oral remarks at the hearing describe its approach:

"Now, at the outset I should like to commend and thank counsel who have submitted to the Court their reports of the five meetings held since the October 14, 1954 hearing in this courtroom. While there is no verbatim transcript, after reading the reports the Court has been able to determine some of the areas of contention and differences of opinion.

"Also, I am extremely pleased that five meetings have been held. Although all problems have not been solved, which was my fervent hope, I believe that we are on our way toward keeping this case in manageable shape. While you have not agreed on voluntary production—except that defendants will bring up to the date of the complaint the documents of the same description previously produced—I believe that plaintiff has more specifically revealed some of the ultimate facts upon which it bases its case. Of course, you may disagree with me on that statement.

"Prior to hearing counsel on the motion, in order that you might direct your arguments toward the problems which I perceive now to be before us, I should like to comment further.

"1. Defendants contend that plaintiff should reveal more facts which it has ascertained from its examinations of documents previously produced.

[fol. 1402] "Several times in their reports counsel for Lever and Procter state that plaintiff concedes that it has facts and that defendants are entitled to them substantially in advance of trial, but that at this time the plaintiff will not reveal these facts. This really

goes to the crux of the motion, I believe, now before the Court because I believe that as more facts are revealed to the defendants they will voluntarily produce documents relating thereto.

"I am convinced of that. I don't know whether the Government is, but I am.

"Thus Item 3 in the Court's letter to counsel dated October 22, 1954, is the starting point for today's argument. 'At this time is it unreasonably to ask plaintiff what facts it has determined from the many documents already produced? Is the case ripe for a statement of facts by the plaintiff? If not, when?

"One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer, how long must we wait for defendants to prepare their case? The sooner defendants are informed of plaintiff's factual contentions, the sooner defense preparation can commence—and not before, obviously.

"The 'Tentative Statements of Issues of Fact' submitted by the plaintiff contain some revelations of fact which will aid us on this motion; but as to the general statements therein, perhaps defendants should use interrogatories under Rule 33, which provides that when questions are propounded by a party, it 'shall furnish such information as is available to the party.'

"I want plaintiff's counsel to tell me (1) Does plaintiff now have unrevealed facts? (2) If it does, what objection is there to revealing them to the defendants at this time? And if plaintiff does have unrevealed facts, why doesn't it use Rule 36 pertaining to admissions, then perhaps certain issues of fact will be eliminated from the case, thereby eliminating the need for the production of documents relating thereto.

"2. Are the 'Tentative Statements of Issues of Fact' sufficiently specific to enable Court and counsel to determine the need for the production of additional documents and to enable defendants to prepare their defense?

"I have found twelve statements that appear to meet the 'how, when, and by whom test.' In the Statement re Advertising and Promotions, paragraph I-B-1 states

how—agreement; when—1937; by whom—manufacturing defendants; and what—limitations on advertising and promotional expenditures for established brands. [fol. 1463] "So, as to that statement, while preparing their case, defendants know that the plaintiff will offer evidence to prove that in 1937 the manufacturing defendants entered into an agreement imposing limitations on their advertising and promotional expenditures for their established brands; and, secondly, any documents which evidence such an alleged agreement are relevant subject in a discovery motion.

"Also in the Statement re Advertising and Promotions, paragraph I-B-2 appears to be sufficiently specific for our twofold purpose as do paragraphs II-B-1, II-B-3 and II-B-4 in the same Statement.

"Now, in the statement re Glycerine, the following paragraphs appear to be sufficiently specific: I-A-2, I-B-1, I-B-2 and I-B-3.

"And in the Statement re Tallow and Grease, paragraphs I-B-2, I-B-3 and I-B-4 appear to meet our test and purpose.

"An example of the importance for plaintiff to reveal facts is shown by comparing its Statement re Advertising and Promotions, paragraph I-B-1, with the sole allegation in the complaint relating to the fact of limitations on expenditures, which is on page twelve of the complaint, Item 7, 'By controlling, manipulating and fixing amounts which they expend for promotions and advertising.'

"Compare that statement with the new statement, 'In 1937 the manufacturing defendants reached an agreement imposing limitations on their advertising and promotional expenditures for their established brands.'

"From the latter we now know two factual contentions—(1) agreement, (2) 1937—which were not revealed in the complaint.

"Thus as to the prices; advertising and promotion; glycerine; tallow and grease, plaintiff has stated some of the ultimate fact upon which it will rely. My comments on plaintiff's new Statements were not intended to be exhaustive, but only to illustrate my tentative

thinking regarding the main objection now raised by the defendants. Of course, I want to hear the views of counsel on the problem.

"3. Has there been compliance with all prior discovery orders, because as I noted in my letter of October 22 it then appeared that some documents were currently being produced.

"4. Modification of the motion. Item 4 in the Court's letter of the same date suggested that [fol. 1404] plaintiff might desire to modify its motion and the reports by Lever and Procter indicate that plaintiff concedes that some of the material demanded either would be withdrawn or disposed of by stipulation.

"Of course, still we are faced with the problem of how many years back should production be ordered. In plaintiff's Tentative Statements, however, there are date references tied in with certain alleged conduct, as, for example, beginning in 1936 defendants have fixed prices; in 1926 defendants formed the defendant Association; beginning in 1937 defendants established identical list prices.

"Such 'when' information is an improvement over the sole allegation in the complaint as to the date—'Beginning in 1926 and continuing thereafter,'—which is found on page 10, Item 32 of the complaint.

"I now ask if all counsel agree with Procter's statement at page 10 of its report that we should defer argument regarding a cut-off date? Or should the question now be argued?[16]

* * * * * * *

Although plaintiff admitted it had discovered many facts from the documents previously produced, it vigorously argued that defendants did not then need those facts. The court was persuaded that plaintiff improperly had refused to reveal facts even though several days earlier on December 3, 1954, it had submitted to defendants "Tentative Statements of Issues of Fact," relating to: (1) prices and costs, (2) advertising and promotions, (3) glycerine, (4)

---

[16] Argument has been deferred.

tallow and grease.[17] While those statements were more specific than the allegations in the complaint, (see for example, the court's December 7, 1954, comments, quoted *supra*,) it was obvious that plaintiff could have stated more facts. Believing that in a protracted anti-trust action there [fol. 1405] must be an early disclosure of facts, the court suggested and the parties accepted a procedure. It was designed to hurdle what the court felt was the only obstacle to defendants' consent to produce some documents and to give defendants the facts relied upon by plaintiff, permitting plaintiff to object to being ordered to disclose any detailed, evidential facts.

> "Using the plaintiff's tentative statements of issues of fact as a basis—
>
> "(1) Within ten days from today, defendants submit to court and counsel their questions, such as Mr. Fortas' oral questions in court today, directed to the plaintiff's statements.
>
> "(2) Within ten days after defendants have served and filed their questions, plaintiff submit to the court their objections, and, of course, perhaps as to some questions plaintiff will not object to supplying answers.
>
> "(3) Court will rule on which questions must be answered.
>
> "(4) Then within two weeks of the Court's rulings on the questions and answers, plaintiff serve and file answers.
>
> "(5) Then within one month both parties, either with or without the Court's aid, agree on voluntary production and where there is disagreement the Court will rule and enter orders based on plaintiff's *reframed* motion. As to the time intervals, if counsel believe more time is needed, let's settle it now and there will be no extensions."

Commencing about January 1, 1955, and continuing until January 13, 1955, Procter, Colgate, and Lever submitted

---

[17] Plaintiff also submitted on February 18, 1955, statements relating to mergers and acquisitions, and patents, and on May 9, 1955, market position.

their questions relating to plaintiff's tentative statements of issues of fact; for example, one of plaintiff's statements as to prices and costs was "1. In 1926 Procter, Lever, and the three companies which later merged to form Colgate joined with other soap manufacturers to establish the defendant Association for the purpose, among others, of considering joint action among such manufacturers with respect to matters affecting prices." Lever asked five questions relating to that statement: "1. Is the reference to 'such manufacturers' meant to include all the soap manufacturers forming the Association. 2. Specify [fol. 1406] the 'joint action * * * with respect to matters affecting prices' for which the Association was allegedly established. 3. Specify the other purposes for which the Association was established. 4. Identify the 'matters' as to which the soap manufacturers are alleged to have considered joint action affecting prices; specify the use or proposed use of the Association in relation thereto; and describe the activities of Lever Brothers in connection therewith. 5. Identify the documents presently in the Government's possession which provide a basis for the allegations and which show that Lever Brothers participated in the activities described in [the statement]." Plaintiff answered the questions: 1. Yes. 2. "To eliminate 'trade wars,' 'cannibalism' and 'forcing' in the manufacture and sale of soap products; to increase the revenue obtainable from the sale of glycerine, the principal by-product from the manufacture of soap. 3. "* * * according to its Certificate of Incorporation, were: '* * * collecting and circulating information valuable and useful to the public with reference to the use of soap and kindred products, * * * investigating the nature and use of glycerine and kindred substances and disseminating information with reference thereto, and * * * promoting the best interests of producers of soap and glycerine and kindred products.'" 4. "The Association was established for the purpose of considering joint action with respect to the following matters allegedly affecting the prices of household soap products and glycerine: excessive glycerine production and supply; excessive household soap production and supply; trade wars; cannibalism; and forcing. The use of the Association in relation thereto was that stated in the issue, namely 'con-

sidering joint action.' In this respect, the Association was used as a forum or meeting ground. Lever Brothers, either directly or through its officers and agents, attended meetings [fol. 1407] of the Association, served on Association committees, held official positions and memberships on the Board of Directors, voted, paid dues and made other financial contributions to support Association activities, and in general took part in activities of the Association." As to question 5., the court sustained plaintiff's objection to answering it.

January 13, 1955, plaintiff filed a brief objecting to some of defendants' question. The objections mainly were to questions asking for a designation of documents relied upon as evidence of alleged facts,[18] and to questions asking for detailed evidential facts.[19]

January 25, 1955, the court filed its opinion:

> "The procedure suggested by this court and accepted by all counsel during the December 7, 1954 hearing (transcript pp. 97-8) was devised because the defendants properly asked the plaintiff to disclose what facts it had ascertained from the produced documents.
>
> "Pursuant to phase (1) of the procedure the defendants have served and filed questions directed to the plaintiff's Tentative Statements of Issues of Fact, and pursuant to phase (2) the plaintiff has served and filed its objections to answering certain questions.
>
> "At this time, the plaintiff need not designate the documents relied upon or set forth the substance of its evidence of the alleged facts. Although I did not believe that the defendants now would ask for such information, nevertheless, during the hearing on plaintiff's reframed motion (see phase (5) transcript p. 98) I shall hear counsel on the problem. My present thinking is that plaintiff should designate documents when it completes discovery under Rule 34 after documents are produced pursuant to the reframed motion.

---

[18] For example, Lever's question #5 quoted above.

[19] For example, "state the basis upon which it is alleged"; "indicate all instances"; "describe the information exchanged"; "specify the dates, place, quantity, etc."

"As to the questions objected to by the numbers listed at pp. 9 and 10 in the plaintiff's Memorandum of Objections dated January 13, 1955, I hereby order that [fol. 1408] the following questions be answered:

PROCTER

57, 58, 81, 112, 132, 134.

LEVER

81, 87, 93, 94, 116, 124.

COLGATE

41, 42, 75.

"As to the questions objected to by the numbers listed at footnote 5, p. 10 of plaintiff's Memorandum, the above orders will guide plaintiff and I shall rely on its good faith in answering those questions in accord with the orders herein and the intent and spirit of Rule 33.

"Within one month after the date on which plaintiff completes the service and filing of its answers to the questions, unless plaintiff requests an extension of time, counsel for both sides will attempt to agree on voluntary production, and where there is disagreement I anticipate the filing of a reframed motion under Rule 34 (transcript, p. 98)."

Pursuant to the court's opinion, on March 2, 1955, plaintiff answered the questions which previously it had objected to answering. Then for the next several months defendants and plaintiff continued to exchange questions and answers based upon plaintiff's Tentative Statements. Finally, on April 19, 1955, after counsel had conferred five times, they appeared in court and presented their consent orders.[20]

[fol. 1409a] [File endorsement omitted]

---

[20] See footnote 1, *supra*. Since plaintiff had not submitted its Tentative Statement relating to market position, the consent orders did not cover the relevant documents. However, in May, June, and July, 1955, plaintiff submitted its

[fol. 1410] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF HEARING ON MOTION FOR ORDER—Filed May 2, 1956

To: Raymond Del Tufo, Jr., Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Joseph E. McDowell, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Kenneth C. Royall, Esq., Dwight, Royall, Harris, Koehel & Caskey, 100 Broadway, New York 5, New York. Mathias F. Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N.W., Washington 6, D.C.

SIRS:

A copy of a proposed order, substantially in the form annexed hereto, having been presented to the attorney for the Plaintiff on April 24, 1956, and the Defendant, The Association of American Soap & Glycerine Producers, Inc., not having been advised as to whether the form of said order [fol. 1411] was satisfactory to the Plaintiff,

Please take notice that on the 14th day of May, 1956, at 10:00 A.M. or on such earlier date as may be agreeable to the Court and the parties herein at the Federal Courthouse, Newark, New Jersey, the Association shall present to the Court for entry, a proposed order, a copy of which

---

Statement relating to market position, defendants asked their questions, and plaintiff answered them. The parties have not advised the court concerning the so-called market position documents described in plaintiff's Rule 34 motions. Since, however, plaintiff has submitted its Tentative Statement relating to market position, and the parties have exchanged questions and answers, it appears that consent orders will be presented.

is attached, pursuant to the Honorable Alfred E. Modarelli's opinion filed April 17, 1956.

Yours very truly, McCarter, English & Studer, By (S.) Augustus C. Studer, Jr. Davies, Richberg, Tydings & Landa, By (S.) Adrien F. Busick, By (S.) James T. Welch.

Dated: May 2, 1956

[fol. 1412] PROPOSED ORDER

The defendant, the Association of American Soap and Glycerine Producers, Inc. (hereinafter called "the Association"), having filed a motion herein on November 25, 1955, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956, setting forth, among other things, the facts and circumstances upon which the Court's decision and this order are based,

Now, therefore, it is

Ordered, that the motion of the Association be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D.C. or such other place as the parties may agree, and permit the Association or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony [fols. 1413-1415] of all witnesses who appeared before the Grand Jury of this Court sitting in Newark, New Jersey, from May 1951 through November 25, 1952 in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

——, ——, U.S.D.J.

Dated: ——.

[fols. 1415a-1417] [File endorsement omitted]

[fol. 1418] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF HEARING ON MOTION FOR ORDER—Filed May 2, 1956

To: Raymond Del Tufo, Jr., Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Joseph E. McDowell, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Mathias F. Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington 6, D. C. Adrien F. Busick, Esq., Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C.

SIRS:

A copy of a proposed order substantially in the form annexed hereto having been presented to the attorney for the plaintiff on April 24, 1946, and the defendant, THE [fol. 1419] PROCTER & GAMBLE COMPANY (hereinafter called "Procter"), not having been advised as to whether the form of said order was satisfactory to plaintiff,

PLEASE TAKE NOTICE, that on the 14th day of May, 1956, at 10 a.m., or on such earlier or other date as may be agreeable to the Court and the parties herein, at the Federal Court House, Newark, New Jersey, Procter shall present to the Court for entry a proposed order, a copy of which is attached, pursuant to the Honorable Alfred E. Modarelli's opinion filed April 17, 1956.

Dated: May 2, 1956

Yours, etc., Toner, Crowley, Woelper & Vanderbilt, by John A. Ackerman, 810 Broad Street, Newark, New Jersey. Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 12th floor Union Central Building, Cincinnati 2, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1420] PROPOSED ORDER

The defendant, The Procter & Gamble Company (hereinafter called "Procter"), having filed a motion herein on September 24, 1954, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956, setting forth, among other things, the facts and circumstances upon which the Court's decision and this order are based,

Now, therefore, it is

Ordered, that the motion of Procter be and it hereby is granted, and that plaintiff, within thirty (30) days from [fol. 1421] the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Procter or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: May 2, 1956.

——, ——, U.S.D.J.

[fols. 1422-1424] AFFIDAVIT OF SERVICE (omitted in printing)

[fol. 1424a] ACKNOWLEDGMENT OF SERVICE (omitted in printing)

[File endorsement omitted.]

[fol. 1425] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF MOTION—filed May 3, 1956

SIRS:

A copy of a proposed order substantially in the form annexed hereto having been presented to the attorney for the plaintiff on April 24, 1956, and the plaintiff having refused to consent to the form of order, without giving any specific objection to the form of order, presumably for fear of prejudicing the motion currently filed by plaintiff for reargument of the motion to which said form of order is directed,

Please take notice, that on the 28th day of May, 1956, at 10 A.M., or on such other date as may be agreeable to the Court and the parties herein, at the Federal Court House, Newark, New Jersey, defendant Colgate-Palmolive Company shall present to the Court for entry a proposed order, a copy of which is attached, pursuant to the Honor-[fol. 1426] able Alfred E. Modarelli's opinion filed April 17, 1956.

Dated: May 2, 1956.

Yours, etc., O'Mara, Schumann, Davis, & Lynch, by Edward J. O'Mara. A member of said firm No. 1 Exchange Place Jersey City 2, New Jersey. Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York, Attorneys for Defendant, Colgate-Palmolive Company.

To: Honorable Raymond Del Tufo, Jr., United States Attorney Newark 1, New Jersey. Honorable Joseph E. McDowell, Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D. C. Messrs. Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington 6, D. C. Messrs. Bailey, Schenck & Bennett, 744 Broad Street, Newark, New Jersey. Messrs. Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C. Messrs. McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey. Messrs. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York. Messrs. Dinsmore,

Shohl, Sawyer & Dinsmore, Union Central Building, Cincinnati, Ohio. Messrs. Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey.

[fol. 1427] PROPOSAL ORDER

The defendant, Colgate-Palmolive Company (hereinafter called "Colgate"), having filed a motion herein on November 28, 1955, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956, setting forth, among other things, the facts and circumstances upon which the Court's decision and this order are based,

Now, therefore, it is

Ordered, that the motion of Colgate be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as [fol. 1428] the parties may agree, and permit Colgate or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the Grand Jury of this Court sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: May 2, 1956.

——, ——, U.S.D.J.

[fols. 1429-1431] AFFIDAVIT OF SERVICE, (omitted in printing)

[fol. 1431a] [File endorsement omitted.]

[fol. 1432] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

Civil Action No. 1196-52

NOTICE OF MOTION—April 30, 1956

To: Wathias F. Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York. Abe Fortas, Esq., Arnold, Fortas & Porter, 1229 Nineteenth Street, N. W., Washington 6, D. C. James T. Welch, Esq., Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C. Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York. O'Mara, Schumann, Davis & Lynch, 1 Exchange Place, Jersey City, New Jersey. Bailey, Schenck & Bennett, 744 Broad Street, Newark, New Jersey. Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey. McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey.

Please take notice that the undersigned will bring the within motion on for hearing before this Court at the Federal Building, Newark, New Jersey, on the 28th day of [fol. 1433] May, 1956 at 10:00 a.m., or at such other time as the Court may order.

Dated: April 30, 1956

Joseph E. McDowell, Attorney, Department of Justice.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 1434]. In United States District Court for the District of New Jersey

[Title omitted]

Motion for Reconsideration of Ruling on Defendants' Motions to Inspect the Grand Jury Transcripts and for Ruling on Claim of Privilege—Filed May 3, 1956

Whereas, each of the defendants has moved the Court to compel disclosure of transcripts of testimony of all witnesses who appeared before a Federal Grand Jury which sat in Newark, N. J. from May 1951 through November 25, 1952; and

Whereas, the Court in its opinion dated April 17, 1956 reached the conclusion that an order compelling the requested disclosure may and should properly be granted under the discovery provisions of the Federal Rules of Civil Procedure, and in accordance with its decision has directed that such an order be submitted; and

Whereas, the Attorney General of the United States has determined that disclosure of the transcript of testimony of any witness before the said grand jury for the use of defendants in this case would be prejudicial to the grand jury system and not in the public interest, and has filed with this Court a formal Claim of Privilege asserting the privileged status of said transcripts of grand jury testimony;

Now, plaintiff respectfully moves that this Court reconsider its conclusion that the extensive scope of pre-trial discovery permitted under the Federal Rules of Civil Pro-
[fol. 1435] cedure warrants disclosure in this civil case of traditionally secret grand jury proceedings, and, in the light of the claim of privilege asserted by the Attorney General, that this Court sustain the privileged status of the grand jury transcripts and enter an order denying defendants access to the transcript of testimony of any witness before the said grand jury.

Dated: April 30, 1956.

(S.) Stanley N. Barnes, Assistant Attorney General.
(S.) Victor H. Kramer, Attorney, Department of Justice. Joseph E. McDowell, Attorney, Department of Justice.

[fol. 1436] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

CLAIM OF PRIVILEGE—Filed May 3, 1956

Privilege is claimed for the transcripts of testimony of all witnesses before the federal grand jury impaneled in the District of New Jersey from May 1951 to November 25, 1952, which made inquiries concerning possible violations of the federal antitrust laws by persons in the soap and synthetic detergent industry. This privilege I now assert to fulfill the Attorney General's joint responsibility with the courts to protect the integrity of grand jury processes. The assertion of privilege is based on a careful consideration of the effects of the disclosure of transcripts of testimony of grand jury witnesses upon the public interest in the proper administration of justice.

My claim of privilege here is rooted in the established policies underlying non-disclosure of grand jury transcripts. One of the important reasons for the long standing public policy against disclosure of grand jury proceedings and testimony is "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes," *United States* v. *Rose*, 215 F. 2d 617, 628, and that "those who testify may feel free to speak [fol. 1437] the truth without reserve", *Goodman* v. *United States*, 108 F. 2d 516, 519, 522. This is essential to the effective administration of justice.

The Department of Justice holds the transcripts of grand jury testimony as a trustee for the benefit of the people. The privilege against disclosure of such transcripts is that of the government, and not of the witnesses, and cannot be waived by consent of the witnesses. It is the obligation of the government to protect witnesses from any form of pressure or compulsion to disclose what was said in the privacy of the grand jury. The suggestion that the guarantee of secrecy of testimony given before a grand jury is, however, temporary, and ends after the grand jury has been discharged, overlooks a fundamental difficulty. Employees of the defendants and persons who do business with them, to whom the continued good will of the defendants is impor-

tant, have heretofore given their testimony in what was thought to be strictest confidence. Acquiescence in the proposed order would constitute notice to every future witness in a grand jury proceeding that his testimony may in the future be disclosed to an employer, or business associate, or other person whose continued good will is important to his economic welfare. Under such circumstances, there would be a strong incentive for the witness to refrain from giving testimony which would be detrimental to the interests of economically powerful potential defendants. It would also tend to intimidate those who might otherwise give testimony against racketeers, mobsters and gangsters, thereby subverting the entire grand jury system.

For these reasons, the disclosure by the Department of Justice of the transcripts of testimony of witnesses before the grand jury for use of defendants in this civil case would be prejudicial to the efficient and effective use of grand [fol. 1438] juries as instrumentalities for the detection and investigation of crimes, and would thus be prejudicial to our grand jury system and contrary to the public interest. Accordingly, by virtue of the authority vested in me, and for the reasons given, I assert the privileged status of said transcripts of testimony.

Respectfully, Herbert Brownell, Jr., Attorney General.

Dated: April 30th, 1956.

[fol. 1439] GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF RULING ON DEFENDANTS' MOTIONS TO INSPECT THE GRAND JURY TRANSCRIPTS AND FOR RULING ON CLAIM OF PRIVILEGE—Filed May 3, 1956.

This memorandum is in support of the government's motion for a reconsideration by the Court of its opinion of April 17, 1956, that plaintiff should be required to produce and permit the inspection and copying by defendants of certain grand jury transcripts. The pertinent facts are fully set forth in the Brief of The United States in Opposition to Motions for Production of Grand Jury Transcripts, dated December 7, 1955.

Plaintiff urges the Court to sustain the Claim of Privilege filed herewith by the Attorney General of the United States and enter an order denying defendants access to said grand jury transcripts.

[fol. 1440] Question Presented

Should production of grand jury transcripts be ordered in this case for discovery purposes after the Attorney General has determined that disclosure would be contrary to the public interest?

Points and Authorities

1

Public policy for the protection of the grand jury is opposed to disclosure of grand jury proceedings and testimony.

United States v. *Rose*, 215 F. 2d 617, 628 (C.A. 3, 1954).

United States v. *Garsson*, 291 F. 646 (D.C. S.D. N.Y., 1923).

United States v. *Smyth*, 104 F. Supp. 283, 303 (D.C. N.D. Calif., 1952).

United States v. *American Medical Association*, 26 F. Supp. 429 (D.C. D.C., 1939).

2

Exceptions to the rule of secrecy have been made only where the courts have concluded that partial and narrowly limited disclosure was required (1) at trial, in the exercise of the courts' supervisory responsibilities under Rule 6(e) of the Federal Rules of Criminal Procedure, (2) for the protection of the rights of the accused in criminal cases, (3) on other grounds peculiar to criminal cases, and (4) by the public interest in permitting disclosure to public officials in the enforcement of law.

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, pp. 233-234.

[fol. 1441] *Schmidt* v. *United States*, 115 F. 2d 394 (C.A. 6, 1940).

United States v. *White*, 104 F. Supp. 120 (D.C. N.J., 1952)

United States v. Alper, 156 F. 2d 222 (C.A. 2, 1946)
Herzog v. United States, 75 S. Ct. 349 (1955); 226 F. 2d 561 (C.A. 9, 1955).
In re Grand Jury Proceedings, 4 F. Supp. 283 (D.C. E.D. Pa., 1933).
In re Bullock, 103 F. Supp. 639 (D.C. D.C., 1952).

3

It is immaterial that the grand jury has been discharged and that its investigation has been followed by an action for civil rather than criminal enforcement of the antitrust laws, because in any event the disclosure of testimony given in secret would tend in future investigations to restrict the free functioning of the grand jury.

United States v. Standard Oil Company of California, et al., Civil No. 11584-C, S.D. Calif., C. Div., Minutes of the Court, March 30, 1956.
United States v. General Motors Corp., 15 F.R.D. 486 (D.C. Del., 1954).
United States v. Morgan, Civil Action No. 43-757, S.D. N.Y., unreported ruling of Judge Medina, December 8, 1948.
Goodman v. United States, 108 F. 2d 516 (C.A. 9, 1939).
United States v. American Medical Association, 26 F. Supp. 429 (D.C. D.C., 1939).

4

Production of grand jury transcripts should be denied where, as here, the Attorney General has determined that disclosure would be contrary to the public interest, and de- [fols. 1442-1443] fendants have other means of obtaining all information necessary to the preparation of their case —particularly where defendants have conceded that they have other means by which they could obtain information concerning the very matters which were the subject of grand jury testimony.

United States v. Reynolds, 345 U.S. 1 (1953).
Hickman v. Taylor, 329 U.S. 495 (1947).
United States v. Standard Oil Company of California, et al., Civil No. 11584-C, S.D. Calif., C. Div., Minutes of the Court, March 30, 1956.

United States v. *United Shoe Machinery Corp.*, 76 F. Supp. 315, 317 (D. Mass., 1948).

United States v. *Deere & Co.*, 9 F.R.D. 523, 527 (D. Minn. 1949).

United States v. *Schneiderman*, 104 F. Supp. 405 (S.D. Calif., C.D., 1952).

Moore's Federal Practice, Vol. 4, (2d ed.) § 26.25 (pp. 1175-6).

Colgate Brief dated November 28, 1955, p. 10.

Lever Brief dated November 28, 1955, p. 5.

Procter Brief dated November 28, 1955, p. 10.

Respectfully submitted, (S.) Stanley N. Barnes, Assistant Attorney-General. (S.) Victor H. Kramer, Attorney, Department of Justice. (S.) Joseph E. McDowell, (S.) Daniel H. Margolis, (S.) Raymond M. Carlson, (S.) Robert Brown, Jr., (S.) Jennie M. Crowley, Attorneys, Department of Justice.

April 30, 1956.

[fol. 1443a] [File endorsement omitted]

[fol. 1444] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

To: Raymond Del Tufo, Jr., Esq., United States Attorney for the District of New Jersey, Federal Building, Newark, New Jersey. Joseph E. McDowell, Esq., Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D.C. Mathias F. Correa, Esq., Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York. Kenneth Royall, Esq., Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York. Adrien F. Busick, Esq., Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N.W., Washington 5, D.C.

NOTICE OF SETTLEMENT OF ORDER—Filed May 8, 1956

SIRS:

A copy of a proposed Order in the form annexed hereto having been presented to the attorney for the Plaintiff on April 24, 1956, and Defendant Lever Brothers Company not having been advised as to whether the form of Order was satisfactory to the Plaintiff,

Please Take Notice that on the 11th day of June, 1956, at 10 A.M., or as soon thereafter as the parties may be heard, at the Federal Courthouse in Newark, New Jersey, [fol. 1445] Defendant Lever Brothers Company will present to the Court for settlement a proposed Order, a copy of which is annexed hereto, pursuant to the opinion of the Hon. Alfred E. Modarelli, dated April 17, 1956.

Respectfully submitted, by Alexander T. Schenck, 1180 Raymond Boulevard, Newark, New Jersey. Arnold, Fortas & Porter, by Abe Fortas, 1229 19th Street, N.Y., Washington, D.C., Attorneys for Defendant, Lever Brothers Company.

Dated: May 4th, 1956.

[fol. 1446] PROPOSED ORDER

The defendant, Lever Brothers Company (hereinafter called "Lever Brothers") having filed a motion herein on November 28, 1954, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 insofar as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956, setting forth, among other things, the facts and circumstances upon which the Court's decision and this order are based,

Now, therefore, it is

Ordered that the motion of Lever Brothers be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D.C., or such other place as the parties may agree, and permit Lever Brothers or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of [fols. 1447-1448] all witnesses who appeared before the Grand Jury of this Court sitting in Newark, New Jersey, from May 1951 through November 25, 1952 in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: May —— , 1956.

——, ——, U.S.D.J.

The form of the foregoing order is hereby consented to:
Joseph E. McDowell, Special Assistant to the Attorney General.

[fols. 1448a-1450] Acknowledgment of service (omitted in printing)

Affidavit of service (omitted in printing)

[File endorsement omitted]

[fol. 1451] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

AFFIDAVIT—Filed May 16, 1956

STATE OF NEW YORK,
County of New York, ss:

MATHIAS F. CORREA, being duly sworn, deposes and says:

1. He is an attorney-at-law and a member of the firm of Cahill, Gordon, Reindel & Ohl, who, with O'Mara, Schumann, Davis & Lynch, are attorneys for defendant Colgate-Palmolive Company in the above entitled action. This affidavit is submitted in opposition to the motion herein by the plaintiff for reconsideration by this Court of the decision of this Court of April 17, 1956 that an order be made and entered herein requiring plaintiff to produce for inspection and copying by the defendant Colgate-Palmolive Company the transcript of the testimony of witnesses in an investigation of possible violations of the antitrust laws in the soap and detergent industry conducted by a Grand Jury of this Court from May, 1951 to November 25, 1952.

2. Plaintiff's motion is a naked motion for reconsideration by the Court of its decision. Plaintiff submits in support of its motion no new facts, no new legal authorities, [fol. 1452] and no new factual or legal arguments.

3. Plaintiff apparently has not changed the position which it has taken throughout the course of this matter that it will decline to give the Court a candid statement as to whether or not and the extent to which it has used the Grand Jury minutes in the preparation of its case to date or plans to use them in the further preparation of its case or upon the trial of the case. As the Court's decision herein notes, the evidence is rather overwhelming that plaintiff has used the Grand Jury minutes extensively in the preparation of its case and plans to use them further.

4. Plaintiff does submit certain of its legal authorities and arguments cited in support of its motion which have

heretofore been urged upon the Court by plaintiff in the form of a so-called "claim of privilege" over the signature of the Attorney General. If this were a case involving a proper plea of privilege by the head of an Executive Department with respect to state secrets whose protection was by law made the duty of such Department and if the claim were interposed timely as this one is not, the execution of the so-called "claim of privilege" by the head of an Executive Department might be relevant to the question before the Court. Such is not the case, however, as the question here relates to the disclosure of the minutes of testimony taken before a Grand Jury of this Court carrying out its duties as an arm of this Court.

5. As has been exhaustively briefed to the Court and as this Court has decided, the determination of questions of public interest involved in such a decision is the ultimate and exclusive responsibility of the Court itself. Accordingly, the so-called "claim of privilege" submitted in [fol. 1453] support of plaintiff's motion can have no more standing than any other legal or factual argument submitted in whatever form by plaintiff's attorneys.

6. That plaintiff's attorneys themselves do not seriously believe it has any different status than the arguments previously advanced by them is strongly indicated by the letter dated April 5, 1956 of the Assistant Attorney General in Charge of the Antitrust Division to the Court in this case. In his letter, in the course of discussion of the case of *U.S. v. Standard Oil Company of California, et al.*, in the Southern District of California, the Assistant Attorney General refers to a so-called "claim of privilege" filed in that case and states of it that it was "based on the same grounds urged by counsel for the Government in the motions now pending before you." The letter also enclosed a copy of the so-called "claim of privilege" interposed in the California case. Comparison of it with the similar claim filed in the instant case discloses that with certain minor and immaterial exceptions they are word for word identical.

7. We see no point or purpose in following plaintiff's lead by repeating and reiterating to the Court in opposition to this motion the identical arguments and citations

in support thereof which we have submitted to the Court in support of our position on the motion of whose decision the instant motion seeks reconsideration. These are before the Court and we respectfully refer the Court to them for a complete answer to and refutation of the various contentions heretofore advanced by plaintiff and repeated in its moving papers on this motion.

[fols. 1454-1457] Wherefore, it is respectfully submitted that plaintiff's motion for reconsideration should be in all respects denied.

Mathias F. Correa.

Sworn to before me this 15th day of May, 1956.

John Nicol, Notary Public. (Seal.)

[fols. 1457a-1463] Proof of Service (omitted in printing)

[File endorsement omitted.]

[fol. 1464] In United States District Court
District of New Jersey

Civil Action No. 1196-52

On plaintiff's motion for reconsideration of ruling on defendants' motions to inspect the grand jury transcripts and for ruling on claim of privilege.

On defendants' motions to settle terms of order to inspect or copy transcripts of testimony heard before grand jury.

United States of America, plaintiff,

vs

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., defendants

Opinion—filed July 9, 1956

Appearances:

Raymond Del Tufo, Jr., Esq., United States Attorney, Attorney for Plaintiff. By George J. Rossi, Esq., Joseph E. McDowell, Esq., Raymond M. Carlson, Esq., Robert

Brown, Jr., Esq., and Mrs. Jennie Crowley, Attorneys, Department of Justice.

Tower, Crowley, Woelper & Vanderbilt, Esqs., Attorneys for Defendant Procter & Gamble Company, by John A. Ackerman, Esq.

Dwight, Royall, Harris, Koegel & Caskey, Esqs., by Kenneth C. Royall, Esq., and H. Allen Lochner, Esq.

Dinsmore, Shohl, Sawyer & Dinsmore, Esqs., by Richard W. Barrett, Esq., of Counsel.

O'Mara, Schumann, Davis & Lynch, Esqs., Attorneys for Defendant Colgate-Palmolive Company, by Edward J. O'Mara, Esq.

Cahill, Gordon, Reindel & Ohl, Esqs., by Mathias F. Correa, Esq., and James B. Henry, Esq., of Counsel.

[fol. 1465] Bailey, Schenck & Bennett, Esqs., Attorneys for Defendant Lever Brothers Company.

Arnold, Fortas & Porter, Esqs., by Abe Fortas, Esq., and Abe Krash, Esq., of Counsel.

McCarter, English & Studer, Esqs., Attorneys for Defendant The Association of American Soap and Glycerine Producers, Inc., by Augustus C. Studer, Jr., Esq.

Davies, Richberg, Tydings, Beebe & Landa, Esqs., by James T. Welch, Esq., of Counsel.

MODARELLI, District Judge.

On April 17, 1956, I filed an opinion on defendants' motions to compel plaintiff to produce and permit the inspection and copying by the defendants of the transcripts of the testimony of all witnesses who appeared before a grand jury sitting in this district from May, 1951, until November 25, 1952. I concluded that since plaintiff is using the transcripts containing relevant information, and since equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial, and since none of the reasons for the rule of secrecy applies, the ends of justice required me to grant the motions.

Now before me are: (1) Plaintiff's motion that "* * * this Court reconsider its conclusion that the extensive scope of pre-trial discovery permitted under the Federal Rules of Civil Procedure warrants disclosure in this civil case of traditionally secret grand jury proceedings, and, in the light of the claim of privilege asserted by the Attor-

ney General, that this Court sustain the privileged status of the grand jury transcripts and enter an order denying [fol. 1466] defendants access to the transcript of testimony of any witness before the said grand jury." (2) Defendants' motions for settlement of the order directed by me in my opinion granting defendants' motions to produce the transcripts.

(1) As to plaintiff's motion, at the beginning of the oral argument I cautioned its counsel against repeating arguments already presented and considered on the original motion.[1] As his arguments progressed, even though he presented nothing new, I permitted him to argue extensively (approximately 54 transcript pages) because I believed that in accordance with my opening remark he would present something new.[2] He did not.

Plaintiff's motion is based upon a "Claim of Privilege" filed by Attorney General Brownell. Summarized, his claim

---

[1] As a result of counsel's disregard of my warning and because it is difficult for a judge to refuse to hear oral argument when counsel are present in court, or to halt it once it has begun, the Judges of this Court on June 18, 1956, adopted a new rule:

"A motion for re-argument shall be made within 14 days after the filing of the court's determination of the original motion and upon the same notice required for the original motion. There shall be served with the notice a memorandum, setting forth concisely the *matters or controlling decisions which counsel believes the court has overlooked.* No oral argument shall be heard unless the court grants the motion and specifically directs that the matters shall be re-argued orally." (Emphasis supplied.)

Of course, the rule does not apply here, but the emphasized portion does express the proper nature of re-argument.

[2] *United States* v. *Reynolds,* 395 U.S. 1, 10, 11 (1953) does indicate that after the court has filed an opinion granting discovery against the United States, it is proper to file a formal claim of privilege. But here, as will be discussed, all of the contentions in the claim filed by Attorney General Brownell were presented to and considered by me on the original motion, even though no formal claim had been filed.

is that it is his joint duty with the court to protect the integrity of the grand jury processes; he has carefully [fol. 1467] considered the effects of disclosure of the transcripts upon the public interest in the proper administration of justice; the established policy of secrecy is based upon a desire to encourage free disclosure by grand jury witnesses; if the court orders disclosure of the transcripts, future grand jury witnesses will be reluctant to give testimony detrimental to the interests of economically powerful potential defendants.

In support of its claim of privilege, plaintiff cites the following cases: *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-234 (1940); *United States* v. *Rose*, 215 F. 2d 617, 628 (CA 3 1954); *United States* v. *Alper*, 156 F. 2d 222 (CA 2 1946); *Schmidt* v. *United States*, 115 F. 2d 394 (CA 6 1940); *Goodman* v. *United States*, 108 F. 2d 516 (CA 9 1939); *United States* v. *General Motors Corp.*, 15 F.R.D. 486 (D.C. Del. 1954); *United States* v. *Smyth*, 104 F. Supp. 283, 303 (D.C. N.D. Calif. 1952); *In re Bullock*, 103 F. Supp. 639 (D.C. D.C. 1952); *United States* v. *White*, 104 F. Supp. 120 (D.C. N.J. 1952); *United States* v. *American Medical Association*, 26 F. Supp. 429 (D.C. D.C. 1939); *In re Grand Jury Proceedings*, 4 F. Supp. 283 (D.C. E.D. Pa. 1933); *United States* v. *Garsson*, 291 F. 646 (D.C. S.D. N.Y. 1923); *United States* v. *Standard Oil Company of California, et al.*, Civil No. 11584-C, D.C. Calif., Minutes of the Court, March 30, 1956; *United States* v. *Morgan*, Civil Action No. 43-757, (S.D. N.Y., unreported ruling of Judge Medina, December 8, 1948).

The *Socony-Vacuum*, *Rose*, *General Motors*, *Garsson*, and *Morgan* cases were already considered and are discussed in my opinion. The cited portion of the *Smyth* case merely states the general rule of secrecy, which I thoroughly discussed in my opinion. *Alper*, *Schmidt*, *Goodman*, *Bullock*, *American Medical Association*, and *In re Grand Jury Proceedings* recognize that a court should order disclosure when in its judgment the ends of justice so require, which was one of the bases of my decision. *White* recognizes an exception [fol. 1468] to secrecy in cases of extreme compulsion where there is a strong and positive showing, which is the case here. There was no opinion in *Standard Oil*. As to the other cited cases relating to plaintiff's fourth point con-

cerning "other means" by which defendants could acquire the information contained in the grand jury transcripts, I also previously considered that argument and I rejected it.

At page 12 of my opinion, I said, "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy." That conclusion was reached after thorough deliberation and analysis of the problems and authorities. Before me at that time was a letter and enclosure from Assistant Attorney General Barnes. He told me about an identical claim of privilege asserted in *United States* v. *Standard Oil Company of California, et al;* he noted that the claim was "* * * based on the same grounds urged by counsel for the Government in the motions now pending before you." He enclosed that claim of privilege signed by Mr. Brownell and it was nearly identical to the one he recently filed in this case. Thus, nothing has been brought to my attention since I filed my opinion that was not before me when I considered defendants' motions. Plaintiff's motion is denied.

During oral argument plaintiff's counsel said, "* * * I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but that the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain [fol. 1469-1470] and prevent violations." (Tr. 12). If that revelation had been in response to my earlier questions regarding plaintiff's use of the transcripts, it would have saved defendants' counsel and me many hours of research and deliberation concerning the very important question as to whether plaintiff is using the transcripts. (See opinion dated April 17, 1956, pp. 4-7.) While if is the duty of the attorneys in the Department of Justice to be zealous advocates, this was an inexcusable concealment from the court of a fact material to the issue involved in defendants'

motions to produce. I make this criticism because in this "Big Case" it is essential that counsel be cooperative and candid.

(2) As to defendants' motions, plaintiff and defendants will exchange their proposed form of the order. If both sides are unable to agree upon the form, I shall enter an order in a form that I believe is proper.

An order shall be submitted in conformity with this opinion.

[fol. 1470a] [File endorsement omitted]

[fol. 1471] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER DENYING MOTION AND CLAIM OF PRIVILEGE AND GRANTING LEAVE TO INSPECT AND COPY TRANSCRIPTS, ETC.—July 23, 1956

The defendant, The Procter & Gamble Company (hereinafter called "Procter"), having filed a motion herein on September 24, 1954, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956; and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion, filed July 9, 1956.

[fols. 1472-1473] Now, therefore, it is

Ordered, that the motion and Claim of Privilege of plaintiff be and they hereby are denied; and it is further

Ordered, that the motion of Procter be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Procter or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23rd, 1956.

Alfred E. Modarelli, U. S. D. J.

The form of the foregoing order is hereby consented to:

Joseph E. McDowell, Trial Attorney, Department of Justice; Toner, Crowley, Woelper & Vanderbilt, by Marshall Crowley 810 Broad Street, Newark, N. J., Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore; Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1473a] [File endorsement omitted]

[fol. 1474] In The United States District Court for the District of New Jersey

[Title omitted]

Order Denying Motion and Claim of Privilege and Granting Leave to Inspect and Copy Transcripts, etc.—July 23, 1956

The defendant, Colgate-Palmolive Company (hereinafter called "Colgate"), having filed a motion herein on November 28, 1955, for an order granting leave to inspect

and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956; and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion, filed July 9, 1956,

[fols. 1475-1476] Now, therefore, it is

Ordered, that the motion and Claim of Privilege of plaintiff be and they hereby are denied; and it is further

Ordered, that the motion of Colgate be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Colgate or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23d, 1956.

Alfred E. Modarelli, U. S. D. J.

The form of the foregoing order is hereby consented to:

Joseph E. McDowell, Trial Attorney, Department of Justice; O'Mara, Schumann, Davis & Lynch, by Edward J. O'Mara, a member of said firm, No. 1 Exchange Place, Jersey City 2, New Jersey; Cahill, Gordon, Reindel &

Ohl, by Mathias F. Correa, a member of said firm, 63 Wall Street, New York 5, New York, Attorneys for Defendant, Colgate-Palmolive Company.

[fol 1476a] [File endorsement omitted]

[fol. 1477] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER DENYING MOTION AND CLAIM OF PRIVILEGE AND GRANTING LEAVE TO INSPECT AND COPY TRANSCRIPTS, ETC.—July 23, 1956

The defendant, The Association of American Soap and Glycerine Producers, Inc. (hereinafter called the association), having filed a motion herein on November 25, 1955 for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 insofar as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956, and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendant's motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim [fols. 1478-1479] of Privilege, and having rendered its opinion filed July 9, 1956,

Now, therefore, it is

Ordered, that the motion and Claim of Privilege of plaintiff be and they hereby are denied; and it is further

Ordered, that the motion of the association be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit the association or its counsel to inspect and copy, by photostating or other means, all or any parts of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23, 1956.

Alfred E. Modarelli, U. S. D. J.

The form of the foregoing order is hereby consented to:

Joseph E. McDowell, Trial Attorney, Department of Justice; McCarter, English & Studer, by Augustus C. Studer, Jr., 11 Commerce Street, Newark 2, New Jersey; Davies, Richberg, Tydings & Landa, by Adrien F. Busick; James T. Welch, 1000 Vermont Avenue, N. W., Washington 5, D. C., Attorneys for Defendant, The Association of American Soap & Glycerine Producers, Inc.

[fol. 1479a] [File endorsement omitted]

[fol. 1480] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER DENYING MOTION AND CLAIM OF PRIVILEGE AND GRANTING LEAVE TO INSPECT AND COPY TRANSCRIPT, ETC.—July 23, 1956

The defendant, Lever Brothers Company (hereinafter called "Lever"), having filed a motion herein on November 28, 1955 for an order granting leave to inspect and copy

transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 insofar as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956; and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion filed July 9, 1956,

Now, therefore, it is

Ordered that the motion and Claim of Privilege of [fol. 1481] plaintiff be and they are hereby denied; and it is further

Ordered that the motion of Lever be and it is hereby granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Lever or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23d, 1956.

Alfred E. Modarelli, U.S.D.J.

The form of the foregoing order is hereby consented to:

Joseph E. McDowell, Attorney, Department of Justice.

[fols. 1481a-1482] [File endorsement omitted]

[fol. 1483] In United States District Court, District of New Jersey

[Title omitted]

Newark, New Jersey

Transcripts of Hearings on June 11, 1956

1. Hearing on motion of The Procter & Gamble Company to settle terms of order to inspect or copy transcripts of testimony heard before grand jury.

2. Hearing on motion by the Association of American Soap & Glycerine Producers, Inc., to settle terms of order to inspect, or copy transcripts of testimony heard before grand jury.

3. Hearing on motion for reconsideration of ruling on defendants' motions to inspect the grand jury transcripts and for ruling on claim of privilege.

4. Hearing on motion by defendant, Colgate-Palmolive Co. to settle terms of order to inspect or copy transcripts of testimony heard before grand jury.

5. Hearing on motion of Lever Bros. to settle terms of order to inspect or copy transcripts of testimony heard before grand jury.

Before The Honorable Alfred E. Modarelli, U.S.D.J.

Appearances:

Raymond Del Tufo, Jr., U. S. Attorney, District of New Jersey, by George J. Rossi, Asst. U.S. Attorney; Joseph [fol. 1484] E. McDowell, Special Asst. to the Attorney General, Raymond M. Carlson, Mrs. Jennie Crowley, and Robert Brown, Jr., Trial Attorneys; Attorneys for the Plaintiff.

Toner, Crowley, Woelper & Vanderbilt, Attorneys for defendant Procter & Gamble Company, By John A. Ackerman; Dwight, Royall, Harris, Koegel & Caskey, Of Counsel, By Kenneth C. Royall and H. Allen Lochner; Dinsmore, Shohl, Sawyer & Dinsmore, Of Counsel, By Richard W. Barrett.

O'Mara, Schumann, Davis & Lynch, Attorneys for defendant Colgate-Palmolive-Peet Company, By Edward J.

O'Mara; Cahill, Gordon, Reindel & Ohl, Of Counsel, By Mathias F. Correa and James Henry.

Bailey, Schenck & Bennett, Attorneys for defendant Lever Brothers Company; Arnold, Fortas & Porter, Of Counsel, By Abe Fortas and Abe Krash.

McCarter, English & Studer, Attorneys for the Association, By Augustus C. Studer, Jr.; Davies, Richberg, Tydings, Beebe & Landa, Of Counsel, By James T. Welch.

[fol. 1485] COLLOQUY

The Court: Now, I should say, before we start, that while there is no local rule of court here concerning the granting of permission to reargue a matter that has been rehashed before, the rules also provide, in the absence of a local rule of court, the state rules apply, the rules of the Supreme Court of New Jersey, and they do provide for granting permission to reargue.

I am sure that you didn't know that, Mr. McDowell, did you?

Mr. McDowell: I did know, your Honor, that local rules are applicable.

The Court: Mr. Rossi.

Mr. Rossi: Your Honor, it gives me pleasure at this time to introduce Mrs. Jennie Crowley, of the Antitrust Division of the Department. She is admitted to practice in the State of Pennsylvania and the District of Columbia. I respectfully move her admission.

The Court: The motion is granted, Mrs. Crowley.

Now, obviously, Mr. McDowell, if it is your intention to bring to my attention matters which you have brought to my attention heretofore, I don't think we should waste your time, my time or your adversaries' time. I want to [fol. 1486] assure you right now that in no motion that has been presented to this Court since I have been on this bench has there been more time, energy and effort expended than in the determination of this motion.

And I want you to know that I was very conscious of what my determination would stand for. Great consideration was given to it, much consideration.

Now, if you have anything new to bring to my attention which you think might alter my opinion as filed, I would

be very happy to hear it; if not, I don't think you should waste your time, either.

STATEMENT BY MR. McDOWELL

Mr. McDowell: Thank you.

When this Court published its opinion on April 17th that grand jury transcripts should be produced here for civil discovery purposes, very serious consideration was given to this matter, not only by the Attorney General personally, but by his advisers, including the Assistant Attorneys General in charge of the Criminal Division and Civil Division, Antitrust Division, and other officials of the Department representing other divisions of the Department. And those officials were disturbed at the implications of a ruling which would require the transcripts of an entire grand jury investigation to be opened up for civil dis- [fol. 1487] covery purposes. The implications of such a ruling quite clearly go far beyond this particular case.

This is not a case in which the Department of Justice appears here representing the Government in behalf of a claim for money damages analogous to ordinary private litigation.

Ever since the decision in the Northern Securities case, decided in 1904, 193 U. S. 197, it has been recognized and settled that in the prosecution of civil actions for the enforcement of the Sherman Act, the Government is performing a sovereign regulatory function in the representation of a public interest declared by the Congress. If the Attorney General were to acquiesce in the view that grand jury transcripts are subject to discovery in this action it would be difficult to maintain that they must be withheld from defendants generally in civil antitrust proceedings and, by the same token, in many other types of proceedings.

It is questionable whether any distinction can be made between this situation, where the Government must proceed on the civil side, in response to a command of the Congress, to enforce a criminal statute by seeking to enjoin and to prevent violations of that statute, and other situations where the Government must take civil actions in [fol. 1488] response to a command of the Congress, and in its sovereign regulatory capacity either to enforce a

criminal statute or to enforce a public interest under related statutes. It is questionable whether it would be possible, even if it were desirable, for the Government to set up airtight compartments, or to put blinders on the eyes of its attorneys, so that no use could be made in civil proceedings arising in the regulatory capacity of the Government of information obtained through grand jury investigations. The question is of particular pertinence, and the greatest difficulty is experienced, not in isolated individual violations, such as a conversion case, or a fraud case, but in cases of conspiracy, where numerous violations may flow, or numerous individual acts may flow from an overall scheme having its roots in different areas and perhaps scattered among a wide number of actors throughout the country.

Must the Government, in order to avoid the risk and peril to the grand jury institution, implicit in any disclosure of the proceedings of an entire grand jury investigation, blind itself, or throw away one of the principal investigatory weapons, and agencies, instrumentalities available to the Government, and which has been available [fol. 1489] through custom under this and under related statutes?

May I suggest one or two examples which go beyond the immediately obvious, I think, examples? Under the Internal Security Act of 1950 the Attorney General is required, just as in the Sherman Act, to resort to civil proceedings. There it is true, the proceedings are not before a court, they are before the Subversive Activities Control Board. But the statute provides for the issuance of subpoenas, requires that subpoenas be issued in those civil proceedings to bring forward any relevant fact, documents or information. It has not occurred to any of the parties involved in any of those proceedings to attempt even to subpoena grand jury transcripts arising from the grand jury investigations, grand jury proceedings, under related statutes which the Government has been compelled to participate in.

Again, under the Civil Rights legislation now before the Congress, certain conduct which might interfere, which might have the effect of interfering with the exercise of civil rights, such as voting, and other rights, is prescribed

and made criminal in character. The Attorney General has testified before the Senate Committee considering this legislation that it is the intention of the Government to rely [fol. 1490] primarily, however, for the enforcement of this statute upon the civil provisions which require, in the draft legislation now before the Congress, that the attorneys for the Government seek in civil proceedings to enjoin and to prevent violations. That statute, that draft legislation, is modeled very closely on the Sherman Act, it is not a unique pattern. There has been no suggestion in the hearings that the Government should not have the benefit in the course of the civil proceedings which are contemplated, upon which it will have to rely, of information obtained, particularly in cases of widespread conspiracy, of information which may be obtainable by the Government only through grand jury investigation.

There is another aspect to this matter which raises problems, when it is considered that it is the practice of the Government to present before grand juries, or that questions asked by Government attorneys appearing before grand juries sometimes necessarily must disclose information which has previously been obtained by the Government through other investigative means, including the FBI. Obviously, any wholesale disclosure of the transcript of an entire grand jury proceeding would open up those matters, [fol. 1491] too, so that the threat would be posed to other investigative techniques.

Again, could the application of this principle of disclosure be confined to civil proceedings? Could the Government successfully oppose the production of grand jury transcripts where there are pending companion civil and criminal proceedings? In the proper exercise of the discretion conferred by the Sherman Act, which was explicitly sanctioned by the Supreme Court in the Standard Sanitary case—United States versus Standard Sanitary Manufacturing Company, 226 U. S. 20, which was decided in 1912—and that opinion, I may say, was written by Mr. Justice McKenna—the Government may elect, under the Sherman Act, to bring either a criminal indictment or to proceed civilly, as it is required in appropriate cases under the express language of the statute to do, to seek to enjoin and prevent violations of that criminal statute. And it was

noted in the Northern Securities case, if your Honor please, that the fact that the Government had elected to proceed civilly did not detract from or lessen the fact that the violations against which the action was directed, and which was sought to be enjoined and prevented, were violations [fol. 1492] of a criminal statute, that is, criminal violations.

If the production of grand jury transcripts be required on the civil side, and if the Government in the proper exercise of its discretion, as confirmed by the Supreme Court in the Standard Sanitary case, has pending both criminal and civil proceedings, in the absence of any abuse sufficient to invoke the exercise of the court's supervisory responsibility, would it not follow that grand jury transcripts would also have to be made available on the criminal side in such a case? After all, explicit constitutional safeguards are present on the criminal side. So that that poses an additional threat of extension of such ruling. If the ends of justice may be said to require disclosure on the civil side to assist defendants in the preparation of their case, would it not be anomalous to say that the ends of justice can be served by anything less on the criminal side?

We cannot, of course, foresee all of the consequences of such a ruling, nor can we say definitely that any of the possible consequences would, in fact, result. It is, however, the glory of our system of law that it is dynamic, it grows, it proceeds from principle, decisions embody principles and each new case as it comes along carries the application [fol. 1493] further. It is impossible to see how far the ripples will reach once this stone is cast into the water. We must recognize that the sweeping disclosure, a complete disclosure here of the transcript of an entire grand jury proceeding would involve a fundamental change in our historic, traditional attitude toward grand jury secrecy.

After careful consideration of the implications, and the possible effect of disclosure upon the functioning of the grand jury system, the Attorney General has concluded that it would be injurious to the public interest to disclose the transcript of the grand jury proceedings involved here. By a motion for a ruling on the claim of privilege we ask that the Court accord respect and weight to that determination.

This claim of privilege is not based upon any assertion of executive independence of the judiciary. We do not seek here any exemption from an obligation to which other litigants might be subjected. Obviously grand jury transcripts are a unique property. They are in the possession of the Department of Justice almost by accident, one might say, of statute, and no one else could be compelled or called upon to produce them.

And may I say, your Honor, before going on, that I [fol. 1494] regret very much any failure or inadvertence on my part which may have given any impression that the Government seeks, or has sought in any way to conceal the use made of the grand jury transcripts in connection with this proceeding. I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but that the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain and prevent violations.

The Court: But that same statute doesn't give the Department the right to issue subpoenas, does it?

Mr. McDowell: Your Honor, that raises a matter of the propriety, as I see it, of the use of the grand jury process. And I propose to come to that.

Rule 6(e) of the Rules of Criminal Procedure authorizes Government attorneys to use grand jury transcripts in the performance of their duties.

At the time Rule 6(e) was drafted and reported to the Congress in 1944 and 1945 it was well known, and it must have been known to members of the Advisory Committee [fol. 1495] who participated in the drafting of those rules, because at least three of them had had substantial experience with the enforcement of the anti-trust laws, that ever since the decision in the Standard Sanitary case, upholding the Government's discretion in this matter, it has been the custom and practice of the Government to institute either civil or criminal proceedings following a grand jury investigation of alleged violations of the Sherman Act, in the proper exercise, as the Supreme Court

said in that case, of its discretion. And pretty clearly—I think it can hardly be challenged that where the Government at the conclusion of a grand jury investigation, having weighed whatever factors are appropriate to be weighed—and there are a number of considerations—as to whether or not it should ask the grand jury to vote an indictment—assuming that one has been prepared, and in my experience one doesn't get through a lengthy grand jury investigation without having an indictment prepared—but assuming that the Government in the proper exercise of its discretion, and I know of no serious challenge here to the propriety of the exercise in this case—it is true there have been charges, there have been suggstions—it has become fashionable in recent years for defense counsel [fol. 1496] to question the propriety and to make the assertion that the Government, wherever a grand jury results only in a civil proceeding, has deliberately, and wrongly—usually the "wrongly" is carried by innuendo or implication—used the grand jury process solely for civil discovery purposes.

Now, I may say that that complaint has been publicized for some time and the Congress has not changed the law, the Congress has not changed the Rules of Criminal Procedure, which give us the right to use the information in the performance of our duties. In this particular case I think the affidavit filed by Government counsel, to which your Honor adverted, is a complete answer to any suggestion of abuse of process in this case. That affidavit, the Court will recall, constituted a sworn statement that counsel had been instructed to investigate violations with a view to proceeding either under Section 1, Criminal, Section 2, Criminal, or violation of Section 3, or with the view to proceeding by civil process. So that the whole range of the Act was there involved, as it is in every grand jury investivation, and as it must be under the statutory scheme.

There never has been any question raised by the courts with respect to this matter. As a matter of fact, the question [fol. 1497] has been presented on four different occasions in the courts, either the identical question presented here, or in on case so close—that's the General Motors case—so close that I don't think it can be really distinguished, and

there hasn't been any suggestion in any of those decisions that there was an abuse here.

I think it would be helpful, in view of the reference which your Honor made to it, in your opinion, to point out, with respect to this question of use of the transcripts by the Government, that the refusal of the Department of Justice to file either an affidavit or a statement setting forth, in your Honor's words, exactly and in detail the use made of the grand jury transcripts, resulted not from any question but what that use was fully known, as the earlier pleadings and statements made here I thought had indicated, but, rather, from the view that it would be inappropriate to furnish a detailed affidavit or statement setting forth exactly how the results of the grand jury investigation had been incorporated into the Government's overall information, compiled from various sources, both before and since the grand jury investigation, and that it would be impossible to furnish such a statement in meaningful detail without waiv-
[fol. 1498] ing the privilege of grand jury secrecy.

The Court will recall that the Government was held to have waived its privilege in the Byoir case by making public reference to grand jury testimony. And the Court will recall that in the Reynolds case the Supreme Court observed the need for caution, that the trial court in examining into the question of basis for privilege not force disclosure of the very thing the privilege was meant to protect.

Now, we think it would be inappropriate for the Court to press us on this point because of the absence here, as we understand it, of any charge of abuse sufficient to invoke the Court's supervisory responsibility over the grand jury proceedings. If that is the case, and we do not understand it to be the case, that the Court wishes to proceed under judicial inquiry, concerning the propriety of the use made of the grand jury transcript, then that is quite another matter and we are fully prepared to cooperate with the Court. But we don't understand that to be the case.

The Court: It is not.

Mr. McDowell: Now, may I mention that the cases to which I had referred, as being the ones in which this identical question had been presented, are the Investment Bank-
[fol. 1499] ers case, with which your Honor is familiar——

The Court: Is that the one Judge Medina decided?

Mr. McDowell: Judge Medina's ruling in that case. —and the Standard Oil case—that's U. S. vs. Standard Oil in the Southern District of California, a very recent case, in which after a preliminary hearing on objections to interrogatories which sought to compel the disclosure of the names of the witnesses who appeared before the grand jury—at the conclusion of that preliminary hearing on those objections Judge Carter stated in a pretrial memorandum that, in his opinion, the Government should furnish not only the names of the witnesses, but under certain safeguards a procedure should be set up under which the defendants might obtain access to the transcript of the testimony of those witnesses who would give their consent.

In that situation the Government filed a claim of privilege identical, or virtually identical, to the claim which has been filed here, and the matter was reargued—or was argued on the basis of the claim of privilege. And at the rehearing Judge Carter stated that he did not understand, at the time he prepared his memorandum on the basis of the original partial discussion of this subject, that the Government [fol. 1500] objected to the disclosure of the transcripts of the grand jury proceeding. And since the matter did come up obliquely on this question of interrogatories, it is quite obvious how that confusion could have arisen. In any event, Judge Carter has sustained the claim of privilege, has ruled that the claim of privilege was appropriate and has denied the motions for production—or has stated that he will deny motions for production.

The Court: Is it possible in that case before Judge Carter that the Government didn't make its position quite clear, as they did here, that they objected strenuously to the disclosure of the grand jury minutes; is that possible?

Mr. McDowell: Well, your Honor, I think that the difficulty arises from the fact that the question was argued on the point whether or not the names of witnesses should be furnished, and Judge Carter in the course of the argument, for some reason, apparently drew the conclusion that the Government did not object to the furnishing of the transcripts of the testimony in appropriate cases. That question was not specifically before him on the argument. The argument went only to the question of——

The Court: The names of witnesses.

[fol. 1501] Mr. McDowell: —whether the names of witnesses should be furnished. So that confusion is understandable.

I may say, in all fairness, your Honor—I don't know whether counsel here have had the benefit of seeing the transcript of that hearing,—but counsel for the defendant in that case stated—very deferentially, but nonetheless vigorously—that they had not so understood, they stated that there never had been any confusion in their minds but that the Government was opposing the furnishing of the transcripts.

Of course, the General Motors case to which I referred a moment ago is very close to the situation here, the only distinction there being that it arose not under the Sherman Act but under a similar statutory scheme.

The Darling case, which is unreported, was an identical situation. I mention it not as authority, in view of your Honor's statement in his opinion about the problem of unreported decisions, not as authority for the main issue here, that the transcripts should not be furnished, but rather as an instance in which this question of the propriety of the use has been raised with the courts, and the [fol. 1502] courts have given no indication that they see any abuse in the use by the Government of information obtained by the grand jury proceedings.

This question has been presented in an analogous situation, not on the precise issue involved here, to the Supreme Court. And there I refer to the Wallace & Tiernan case. That's 366 U.S. 793, 1949. That was a civil action under the Sherman Act, instituted after a grand jury investigation, in which there was also an indictment returned. Subsequently the Supreme Court decided in the Ballard case—Ballard v. U. S.; it is unimportant here; 329 U. S. 187—that the deliberate exclusion of women from a grand jury panel invalidated the indictment. In consequence of that decision the trial court, the District Court before whom the Wallace & Tiernan civil action and indictment were pending, dismissed the indictment in deference to the ruling in the Ballard case.

The Court: Just because there weren't women on the panel?

Mr. McDowell: There were no women permitted on the panel, they were intentionally excluded, your Honor.

The Court: Oh, intentionally excluded.

Mr. McDowell: In response to motions by the defendants for the return of their documents, which had been furnished [fol. 1503] during the grand jury proceeding, on the ground that, because of its illegal basis, the grand jury had no legal existence, and therefore the furnishing of the documents, or the obtaining of the documents, constituted an unreasonable search and seizure, the District Court directed that the documents and all copies be returned by the Government.

When the civil case came on for trial the District Court denied the Government's motion, subpoena, for the production of the documents on the ground that they had originally been illegally obtained and they could not be used. The action was dismissed then; the Government rested, unable to go forward without the documentary evidence. On appeal the Supreme Court held that the orders dismissing the indictment and requiring the return of the documents did not affect the Government's right to have the same documents produced in the civil proceedings. Your Honor has, of course, made a similar ruling in this case without that background.

But the Wallace & Tiernan case is significant here because it necessarily involved a recognition that the civil proceeding was based on information obtained through a grand jury investigation. That was the whole point of the case, the Government couldn't proceed when it couldn't [fol. 1504] get the information, couldn't have the use in the civil case of the information obtained through the grand jury.

So that that decision constitutes an approval, recognition of this policy, this practice, and an approval of the use of such information in a civil action.

Now, coming to the claim of privilege, your Honor, the plaintiff, as well as defendants, has cited a long list of cases which illustrate the development of the rule of secrecy and the development of the exceptic . . the rule of secrecy.

The Court: In fact, I had that in law school, if my memory serves me correctly.

Mr. McDowell: In deference to your Honor's reminder of the rule, we do not propose to attempt to review that

matter in any way; that situation is before the Court. May we merely note that these exceptional cases, involving partial, limited disclosure of grand jury transcripts, in criminal cases, for the most part, typically involve situations where the testimony before the grand jury is the direct and central issue of the case, such as perjury prosecution, or where a plea in bar is involved, or where the Government has, with the permission of the court, publicly used some portion of the transcript of grand jury testimony for im- [fol. 1505] peachment or refreshment purposes.

It is from these cases that the defendants make the long jump to the conclusion that the court has exclusive control over grand jury transcripts for any purpose and may require their disclosure at its discretion to parties in civil as well as in criminal cases, over the objection of the Government. We submit that this conclusion cannot be justified in the absence of such a showing of abuse as would invoke the supervisory responsibility of the court over grand jury proceedings, or of an issue involving the constitutional rights of the defendants.

Plaintiff has not asserted, or does the Attorney General assert by the claim of privilege filed here, that the Government could or would refuse to produce transcripts for review by the Court or upon order by the Court for use by others in any matter involving the authority of the Court over the functioning of the grand jury, where the supervisory control of the Court—specifically expressed in Rule 6, the very rule which gives Government counsel the right to use that information—is involved. Plaintiff fully recognizes the judiciary's clear and paramount obligation over grand juries and their actions. Obviously, no claim of [fol. 1506] privilege could be asserted by the Executive which could thwart or hamper the court in the exercise of that responsibility.

However, the Executive has the obligation and duty to enforce the laws of the Nation and to preserve and protect the investigative means and techniques necessary to this end. Thus the Executive has an independent duty to see that nothing is done to injure or impair the grand jury system or its efficiency as an investigative means. We do not suggest that the Executive has any peculiar pre-

eminence in this field over the court, we merely are of the opinion that the Executive shares with the court a responsibility for the protection and safeguarding of this vital institution.

In instances such as this, which do not involve the supervisory capacity or the jurisdiction of the Court over grand juries and their actions, the Attorney General may assert a privilege against their disclosure—that is, disclosure of transcripts of proceedings—to third parties when, in his opinion, such disclosure would interfere with the performance of his executive duty by impairing the usefulness of grand juries in law enforcement. And that is our situation here.

[fol. 1507] The right of the Executive to interpose objection is based upon the responsibility of the Executive to preserve the grand jury system as an investigative means in the enforcement of law and is a form of privilege more fundamental than one based upon the mere fact of custody. In fact, if the transcripts were impounded in the custody of the clerk of the court, the Attorney General still would have the right and obligation, in our view, to assert the privilege of grand jury secrecy.

By our motion for ruling on the claim of privilege, we ask that the Court accord respect and weight to this determination and this conclusion reached by the Attorney General. We recognize that the determination of the issue of privilege is, in the final analysis, one for the Court, as Professor Moore has pointed out in his treatise on Federal Practice, which has been cited.

And this brings us to the basic proposition, if the Court please, as we see it, that the Court in the exercise of its sound discretion should deny access to grand jury transcripts on the ground that the public interest would not best be served by their disclosure.

It is unnecessary, in our opinion, to review—and it would duplicate ground previously covered—the formation and history of public policy guaranteeing the secrecy of the [fol. 1508] grand jury investigation. With but one possible exception, which I would like to discuss briefly, the Grunstein case, all instances in which federal courts have ordered disclosure of grand jury testimony have been in

the exercise of the Court's supervisory jurisdiction over grand juries, or in criminal cases where grand jury testimony is a direct and central issue, or where the Government and the Court have agreed that disclosure would be in the public interest. It is noteworthy that in none of such cases has there been permitted anything like the sweeping, complete disclosure of the transcript of an entire investigation, such as is contemplated here. And I have mentioned four cases—which previously have been called to the Court's attention—in which the courts have denied the very thing sought here—District Court decisions.

We do not believe that the Supreme Court intended in the Socony-Vacuum decision to announce a new exception to the rule of grand jury secrecy by stating that disclosure was wholly proper when required by the ends of justice after discharge of the grand jury. That decision merely approved a use of the grand jury transcripts, at the trial of the indictment, for impeachment or refreshment pur- [fol. 1509] poses. Such use was, of course, already well established as one of the familiar exceptions to the rule of secrecy. Nothing in that decision touches upon the situation presented here.

May I say a word about the General Motors decision? The Court has questioned the pertinency of the ruling by Judge Leahy in that case. It is, of course, true that the opinion in that case relied mainly upon criminal cases. I don't believe there had been any civil cases presenting this issue before that decision.

The Court: Then he had to rely on criminal cases.

Mr. McDowell: But the reasons for protecting the secrecy of the grand jury process which motivated that opinion by Judge Leahy are just as applicable in civil as in criminal cases, that is, because it is the continuing secrecy of the grand jury process as an institution which is at stake, not any particular record of investigation.

The court in the Rose case, your Honor will recall, deemed the rule of secrecy to rest in part upon the public policy of encouraging free and full disclosure before grand juries, and raised this question of the danger to the functioning of the institution from release of grand jury transcripts, irrespective of what considerations and what

[fol. 1510] reasons arising in a particular case might be argued against release in that case. So that it makes no difference as far as the harm to this public policy is concerned whether the secrecy is breached in a criminal or in a civil case.

So much for one point which your Honor has previously mentioned, with respect to the General Motors case, that is, it relied primarily upon criminal. The other point to which your Honor adverted was that it did not appear that any consideration had been given by Judge Leahy in that case to the use, or possible use, by the Government of the grand jury transcripts. With great deference may I say that we do not agree that that consideration was not present in the mind of Judge Leahy, as indicated by his opinion. If your Honor will permit me, I would like to read briefly from part of that opinion. And I quote—and this is 15 F.R.D., pages 487-488—I am sorry, your Honor, I am not certain now that this particular passage appears at 487-488, but as your Honor will recall, it is a very short opinion:

"It is argued the Department of Justice will have the transcripts of the grand jury available and may use them, and such, it is suggested, will be a tactical advantage the discovery rules were designed to eliminate. But defendant [fol. 1511] here has other discovery techniques at its disposal through which most of the information sought and clues to other possible sources may be obtained. . . . If a precedent is set that evidence before a grand jury may at some future date be disclosed to the probing examination of civil litigants in preparation of the trial of their cause not alone in a collateral matter but, as in the case at bar, in directly related matters where the inquisitorial examination of the grand jury and a civil litigant's discovery in preparation for trial encompass the same subject matter and include an identity of events, such precedent would tend to restrict the free function of the grand jury."

That is on either page 487 or 488.

Of course, it need hardly be urged, and I would merely advert briefly to the proposition, that grand juries often must seek information from persons whose testimony may

well be inhibited by fear of prospective defendants should their testimony be disclosed. And that is not peculiar to cases involving racketeering or the more obvious forms of criminal violence—although that, too, occurs in antitrust cases. Sometimes we have racketeering cases, also, under the antitrust laws. But the economic pressure implicit in the good-will of an employer, or of those with whom the [fol. 1512] witnesses must do business, is peculiarly present in antitrust investigations. And that, I think, is obvious. Any suggestion that grand jury testimony may subsequently be disclosed, with full revelation of the transcript of the investigation, would increase the difficulty even now experienced in securing full, frank and free disclosure from witnesses before grand juries—the purpose cited in the Rose case and the Amazon case, and the other cases, as to the need for continuing secrecy, for maintaining continual secrecy of grand jury investigations.

Now, the Grunstein case, 137 Fed. Supp. 197, is the only case known to plaintiff where a Federal Judge has ruled that even limited access to grand jury transcripts must be allowed on motion of defendants under Rule 34. This decision was in a civil action under the False Claims Act.

May I say, your Honor, that one obvious distinction at the outset is that that case did not involve the endorsement of a policy such as involved in the Sherman Act, but was for the recovery of penalties provided in that Act.

The defendants in the civil case, after termination of the indictment proceedings, had moved to inspect and copy certain portions of grand jury minutes covering the testi- [fol. 1513] mony as to matters relevant to the civil action, of the nine defendants in the civil case, and of any other witnesses who were also to testify at the trial of the civil action. The Court ordered the production of the transcript of testimony. It should be noted that they were not produced.

The Grunstein case was argued here just before motions in this Procter & Gamble proceeding were argued. In the light of the consideration which was given to this question in connection with the motion in this case, the motion in this case and the companion proceedings in the oil case, where the question was up at that same time, the decision of Judge Hartshorne in the Grunstein case received serious

consideration in the Department of Justice, and a rehearing was requested on addifional grounds not presented in the original argument, and those were the grounds of privilege involved here, that is, the possible danger to the grand jury process, although no claim of privilege was filed in that case, your Honor. Judge Hartshorne stated that he would grant rehearing, but no rehearing was held because the case was disposed of by settlement prior to the date set.

It should be noted that that ruling did not go as far as your Honor has gone, it did not go as far as the ruling [fol. 1514] in this case because it authorized only limited disclosure. In fact, the Court—Judge Hartshorne, that is—pointed out the vice of an overall disclosure, and distinguished it. He stated that to reveal the testimony of a grand jury witness, other than a defendant or a witness at the trial would violate the traditional grand jury secrecy, with injurious consequences. He was assured, however, that each of the defendants in that case would take the stand to testify at the trial, each of them having been a grand jury witness, and that by so doing any possible claim of privilege on their part would be waived.

The Court reasoned that if a witness took the stand in the trial to testify concerning a particular transaction, his testimony would have to include all prior admissions concerning that transaction. Now, it appears that Judge Hartshorne may possibly have had some confusion there about the defendants' admissions and a witness's testimony. He uses the language "admissions" in referring to the testimony given before the grand jury, by the grand jury witnesses. And, of course, the ordinary witness before a grand jury doesn't make admissions, he testifies; he testifies in secret. I think that confusion arose from the fact that in the Grunstein case all of the defendants, all of the [fol. 1515] nine movants had been witnesses before the grand jury, and they were defendants in the civil proceeding. So that it may, quite properly, as he said there—their statements before the grand jury might be regarded as admissions. I don't think the point is very important, except it is a little bit curious, the reference to "admissions" by the grand jury witnesses.

Now, we submit that Judge Hartshorne looked only to the privilege of the witness—that was the matter, as I am

informed, that was argued—overlooking the larger question, the greater privilege, posed by public policy.

But grand jury testimony, as we see it, or the disclosure of it, must be weighed by this larger policy and not in terms of the privilege, if any exists, of the individual witness.

Judge Hartshorne referred to the General Motors case, which he said was different because there the defendants had requested a "complete sweep" of the grand jury minutes. And, also, he distinguished the Metzler and Morgan cases on the grounds that the defendants were seeking too much.

We submit that this is a rather indefinite distinction, which Judge Hartshorne reached, based upon—if it is right [fol. 1516] —based upon limited disclosure in one civil case being right, whereas complete disclosure would be wrong. But we can concede—we do not say that there would not be circumstances under which some limited disclosure might be appropriate. I think the important thing is that his action there constitutes no precedent here, because, in fact, he actually distinguished the situation involved here and said that he would not grant such a sweeping disclosure as that which is involved in this case.

Furthermore, the decision is based on the fact that nine of the defendants were persons who testified before the grand jury. In the present case, not one witness before the grand jury is a defendant. It is true that some officers or employees of the defendants testified, but none of these are defendants. Defendants certainly cannot say in this case, as was said in the Grunstein case, that they will call as witnesses all of the grand jury witnesses, at least until they know what such witnesses will testify to. And if they know that, then, of course, what is the need for any grand jury transcript. So that we submit they cannot bring themselves within the rationale of the ruling in the Grunstein case.

The real question presented here, we submit, in the pres- [fol. 1517] ent posture of this case, upon the filing of the claim of privilege, is whether any necessity has been shown which would require a sweeping disclosure of grand jury minutes. That is the question before the Court. As the

Supreme Court said in the Reynolds case, 345 U. S., at page 10—your Honor will recall that case——

The Court: That involved military secrets, didn't it, in a civil action? I think it was an airplane accident where somebody died.

Mr. McDowell: That was a claim under——

The Court: Federal Torts?

Mr. McDowell: —Federal Torts Act, where the Government had consented to be sued and had put itself in the position of any private litigant. There was no question of enforcement of governmental policy, or public policy, involving regulatory action, or anything of that kind involved. There was a difference in the nature of the claim of privilege in that there the claim of privilege was based upon military secrecy. But I think the parallel, in so far as the rationale of the decision, is very close; I believe the situations are identical.

If the Court will permit me, I would like to read one short excerpt from that decision. Your Honor will recall [fol. 1518] that it had been urged, in objection to the discovery sought there, of the report of investigation, that the plane carried military equipment of secret character, but no claim of privilege was filed at that time. The Supreme Court said, even with this information before it:

". . . the trial court was in no position to decide that the matter was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the document on the showing of necessity for its compulsion that had then been made."

Thus emphasizing the distinction between the finding of good cause, or probable cause, sufficient to permit discovery in the ordinary case and the showing of necessity which the courts require where privilege is present.

Now, that brings me to a distinction which I think is important, which underlies this whole problem.

[fol. 1519] The Court: Just hold it a minute, please.

Is that criminal case ready now?

Mr. Del Tufo: Your Honor, it is, sir.

The Court: I have to take a pleading in a case.

Mr. McDowell: This is a good point to interrupt, your Honor.

The Court: And I think, for our purposes, we better adjourn for lunch now, because it is a quarter to 1, and be back here at 2 o'clock.

(Noon recess.)

[fol. 1520] AFTERNOON SESSION

Mr. McDowell: May it please the Court, we had reached the crux of the problem here at the recess. This is a case in which a grand jury was empaneled in this district to investigate violations of the anti-trust laws. At the conclusion of the grand jury investigation the plaintiff, acting under statutory mandate, and in the exercise of a discretion which has been sanctioned by the Supreme Court, elected to bring a civil proceeding to prevent and restrain violations.

In a discovery action, on motions for production of transcripts of grand jury testimony, this Court, and quite properly, exercised its discretion under the Rules of Civil Discovery, and has found—although I do not wish to be taken as conceding that we would agree with the finding—that good cause was shown for the production of the transcripts of testimony taken before the grand jury.

The propriety of such a procedure was approved by the Supreme Court quite recently in the Reynolds case, the opinion in which, I may add, was written by then Chief Justice Vinson. And I looked it up, in view of the discussion earlier today. I note that Mr. Justice Black dissented in that case.

[fol. 1521] Now, there is no question but what the plaintiff—that is, the Government—acting in its sovereign, regulatory capacity, under the Sherman Act here, has had the use of information obtained through the grand jury investigation, both documentary and testimonial.

I may say, as an aside, that I have looked into that matter somewhat and I find that the documents were a much more important source of information than the testimony.

The Supreme Court has held in the Reynolds case that, however proper and correct the procedure followed here was upon the discovery motion, once a formal claim of privilege is filed then a new question is presented, and that is a question not of good cause but a question of necessity. And the Supreme Court stated in that ruling that the extent to which the District Court should probe in satisfying itself that the claim of privilege is appropriate is to be measured by the degree of necessity shown.

And that brings us to the question of what necessity has been shown or exists here. There is no question but that the defendants cannot obtain the exact verbatim text of statements made and questions asked before the grand jury in any other way than by gaining access to the grand jury transcripts. But what the defendants seek here is informa-
[fol. 1522] tion; that is what they are entitled to, information, under the discovery rules. There is a distinction between information as such and the particular form in which it may be embodied. And upon that distinction, we submit, turns the resolution of the question here. That distinction was noted most recently in the Reynolds case, to which reference has been made, where the document involved was a report of investigation setting forth statements made by survivors after the crash of an Air Force plane. There, as here, there was no question but that the only conceivable way in which the parties could obtain the information in the particular form in which it had been embodied was by securing the verbatim text of those statements. But it was the information possessed by the survivors, just as here it is the information possessed by the grand jury witnesses, which was needed by the parties for the preparation of their case. That information, as Judge Medina noted in the Investment Bankers case, in colloquy with respect to this point in that case, had an independent existence prior to and independent of the grand jury proceedings, and the information as such gained no immunity by having been the subject of testimony or, as in the Investment Bankers case, in the particular aspect in which Judge
[fol. 1523] Medina was discussing the matter, that is, in documentary form, by having been presented before a grand jury. That information was and is just as available to the

defendants as to the Government through ordinary discovery procedures.

What the defendants here assert, in short, is not necessity, but convenience. I might note parenthetically, as I am sure the Court is well aware, that convenience itself does not constitute good cause. We have learned that lesson most recently, on the Government side, in the Shoe Machinery case where Judge Wyżanski denied the Government's request for lists of thousands of patents which had been issued to United and which had been compiled in accordance to the way in which the claims of the patents bore upon certain machines. Obviously, it was an enormous chore to analyze those patents and prepare duplicate lists, but nonetheless the Government was put to that burden because, as Judge Wyzanski noted, the information, which was what the Government sought, was already in its possession, or was available to it, through the Patent Office, and through study and examination.

So here, too, the defendants have conceded that they could [fol. 1524] obtain most, if not all, of the information put before the grand jury without seeing the grand jury transcripts. In the original motion filed by Procter on September 24, 1954, it is stated in paragraph (e)—and I quote—that "the names of most if not all of those who appeared and testified before the grand jury in connection with the investigation of the soap industry have been known for many months."

In paragraph (f) it is simply asserted that "the information contained in the grand jury transcripts is necessary to Procter for an adequate preparation of its defenses to this action."

Similar statements are contained in the Association motion.

The Court will note that it was the information contained in the transcripts which defendants urged as being necessary in the preparation of their defenses.

In the motion filed on behalf of Lever Brothers, the grounds given—ground 2 was that Lever Brothers "is urgently in need of access to such testimony in order to discover in this civil proceeding the evidentiary basis, if any, for the charges in the complaint"—the Court will note there it was the evidentiary basis, not the information, which Lever sought.

In the brief filed on behalf of Lever Brothers we find on [fol. 1525] page 5 the statement, "It is conceded by all that the defendants can now proceed to take the depositions of all witnesses before the grand jury and freely inquire into their testimony before that body."

And in the Colgate memorandum the witnesses are identified on page 2; 28 of the grand jury witnesses are identified according to their relationship to the defendants and to other companies. And on page 10 it is stated, "We could take the depositions of the witnesses whose names we know."

The Court: That presupposes that all those witnesses would remember what they said before the grand jury many years ago, is that right?

Mr. McDowell: Well, approximately three years as of the time of the earliest filing of this motion, two to three years ago, your Honor. But there is a point there that merits some consideration. It is apparent from the issues here that the conduct complained of, and which forms the basis of this civil action, goes back over a period of many years, so that the supposedly contemporaneous account which the Government has in the grand jury transcript, or has had access to, was in itself a very old account with respect to many, many of the transactions which, from an examination [fol. 1526] of the complaint, would necessarily go to the root of the issues involved here. So that we do not regard that as being a serious difference betwen the availability of the information to the defendants and its availability to the Government.

The Court: Well, suppose that one of the witnesses who testified before the grand jury was brought in for deposition by one of the defendants and that witness were to say, "Well, I am sorry, General Royall, but do you expect me to remember what I said before that grand jury? I haven't the least idea what I said." Do you think it would be proper then to release the transcript of that witness's testimony for the witness's refreshment of his memory?

Mr. McDowell: No, we would not agree with that, your Honor. It is not a question of what the witness said before the grand jury, it is a question of the witness's knowledge about pertinent transactions. Of course, it would be impossible for the ordinary witness to recall, even two years later,

precisely and exactly the form in which he had stated any knowledge he might have.

The Court: I mean substantially what he said. We have that in trial court every day. A witness says, "Well, your Honor, do you expect me to remember what I said three [fol. 1527] years ago?" Then you say, "Well, give us substantially what you said."

Mr. McDowell: That is exactly the point here, your Honor. The witness's knowledge of the transaction—certainly if it is an important enough transaction to be evidence—the witness's knowledge of the transaction, we contend, would not evaporate overnight, the way his recollection of the precise words he used would. But it is that knowledge, it is that information, to which the defendants are entitled. And it is that information, we submit, they could obtain through questioning of witnesses, interviewing of witnesses, and taking depositions.

It is pertinent, I think, to note that in the identification written by Colgate—18 of the 28 witnesses are identified as having been, either currently or formerly, officers or employees of the defendants.

The Court: Will you hold it a minute? If my memory serves me correctly—you see, you live with this case, I take it; I would hate to tell you the number of cases I have tried while I was preparing this opinion and since I completed it, and the number of motions—didn't I say something in that opinion to the effect that if they could get evidence by other pretrial discovery means they should get it that way?

[fol. 1528] Mr. McDowell: I don't recall that, your Honor.

The Court: Well, I am pretty sure I said it somewhere in there.

Mr. McDowell: The record is barren here of any showing that the defendants—even of any assertion—that the defendants are unable to find or interview any witness who appeared before the grand jury—with respect to one witness, since deceased. There is no showing that the defendants have not already interviewed such witnesses fully with respect to these matters. Is there any doubt but that they interviewed at least their own officers and employees concurrently with the grand jury investigation? Is there any showing that any witness who appeared before the

grand jury has refused to talk to them, or cannot recall the subject matter of his testimony?

It has been suggested by Procter in its supplemental brief that unless the defendants have the transcripts their officers may be charged with making inconsistent statements in subsequent testimony. This is merely and purely an effort to avoid possible impeachment. Is this the showing laid down in the Socony-Vacuum case, that the ends of justice require disclosure?

At the prior argument, as I recall, counsel deprecated [fol. 1529] this question of possible impeachment. I know it doesn't loom large in the thinking of this Court, from the remarks your Honor made, yet the fact remains implicit and inherent that any transcript, no matter when taken, or however much time has elapsed, can readily be utilized by prospective witnesses to guide, to direct, and to limit their testimony at the time of trial. Such discovery, not only to find out what the Government had for its case in chief, but also what material it might have for impeachment, was sought in the Schneiderman case, which has been referred to in our earlier brief. I did not, however, in that brief quote this statement made by Judge Mathes in deciding that case:

"Writings relating to possible . . . . impeachment are essentially in an area where the surprise element is unavoidable; and moreover desirable as a force tending to keep all sides within the narrow confines of the truth."

We would agree that witnesses called from the defendants' ranks—that is, their officers and employees—would not likely be subject to any impeachment.

Were the Government's case to rest solely on the testimony of such witnesses, we would not labor the subject. [fol. 1530] But it does not. The majority of the witnesses called will not fall within that classification. The Government must rely, in part, on testimony of persons not connected with the defendants at the time their testimony was given, some of whom may be dependent on defendants' good-will for their economic welfare.

It would only be human nature for such a person to want to cooperate with defendants, and to dull any testimony

adverse to them, and he could certainly accomplish this with much greater ease by a perusal of the transcript.

Such a shift or supplementation, or, perhaps more accurately, a change of climate in the attitude of the witness, would not aid in the ascertainment of the truth.

Plaintiff submits that defendants, from their own records and from the present recollection of their officials, together with their past interviews, can secure a complete and comprehensive statement with respect to all the matters involved in the issues presented here without any encroachment upon the historical secrecy of the grand jury proceeding. The defendants have made no showing that they are unable to do so.

Now, the defendants will have a list of all witnesses. There is nothing to prevent them from asking each of those [fol. 1531] witnesses what he knows about the industry and the subject matter of his testimony before the grand jury. No reason has been advanced why this procedure would not be satisfactory here.

It appears that the defendants already know the identity of, as they say, "most, if not all" of the witnesses.

Lest there be any doubt whatever on this point, I have been authorized by the Attorney General to furnish the defendants with a complete list of such witnesses, and plaintiff will not object to the entry of an order directing that such a list be supplied. There will then be no question concerning the fact that the alternatives open to the defendants, of interviewing or taking the depositions of such witnesses, will not be hindered by any uncertainty as to who appeared before the grand jury, or any difficulty in locating grand jury witnesses.

Can it be said under all these circumstances that necessity has been shown, or that there is not a practicable alternative available to the defendants for securing the information which they may require? Certainly the inconvenience of taking depositions could not be eliminated by turning over transcripts of the grand jury investigation. Irrespective of what the defendants may do, plaintiff will be required to take substantial number of depositions. It [fol. 1532] is a complete mistake to think, as the defendants' argument seems to suggest, that all of the Govern-

ment's evidence is contained in the grand jury transcripts and that this case could readily and quickly be disposed of on the record of the grand jury proceeding. The substantial requests for documentary discovery made by the Government have already given some indication of the additional scope of the issues.

Under these circumstances, we are in precisely the situation described by the Supreme Court in the Reynolds case. The Court stated, and I quote from page 11:

"Here, necessity was greatly minimized by an available alternative,"—this was after the filing of the formal claim of privilege and after the court had discussed how the question then became one of necessity—"which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity."

May I, with some diffidence, and at the risk of trying the Court's already generous patience, say a word about the subject of fairness, which has been discussed here at some [fol. 1533] length?

There is admittedly considerable appeal in the argument that it is unfair for the Government to have the use of information not available to the defendants, as the defendants imply. If this were the case, we would indeed have a difficult question before us. But that is not the case here. That argument implies too much. I think it is pertinent to note, because of the felicitous turn of language involved, the statement of the Supreme Court with respect to an analogous contention in the Wallace & Tiernan case, which turned upon the illegality of the grand jury, and the argument that therefore the Government might not have the use of any information which if had obtained during the course of the grand jury investigation. The Supreme Court said with respect to that, and I quote from page 799:

"This argument has a superficial plausibility on the word level, but if our attention is directed to the substance rather than symbols the speciousness of the argument is exposed."

So here is the information which the defendants seek and there is no showing that that information is not available to the defendants. If the Government did, in fact, have information which it claimed the exclusive right to use, then the defendants' argument would have some merit. [fol. 1534] But it is only the transcripts of the grand jury proceeding to which the Government claims an exclusive right.

Indeed, the information and facts which form the subject matter of the grand jury investigation were and are peculiarly within the knowledge of the defendants. It was an investigation of the soap industry, the household soap industry. And when you say the household soap industry, and for all practical purposes you say Procter, Lever and Colgate, under our allegations as to the overwhelming percentage of business done in the industry which is done respectively by those three companies.

Those facts within their knowledge, as to their conduct, gain no immunity by becoming the subject of grand jury testimony. In short, it is necessary to distinguish, as Judge Medina did in the Investment Bankers case, between the privileged character of testimony, which has no existence apart from the grand jury, and the non-privileged character of facts which existed prior to and independently of the grand jury investigation, and which are capable of being ascertained in evidence other than through transcripts of grand jury testimony.

It is clear that what the defendants seek here is not [fol. 1535] information concerning relevant facts, but rather to be informed as to precisely what information the Government acquired during the grand jury investigation.

If I may be permitted to paraphrase the defendants' argument with respect to fairness, in terms of the realities of the situation here, the argument is that it is unfair for the Government to have acquired information concerning the defendants' conduct, and to be free to use that information in this proceeding, without disclosing to the defendants, not merely the substance of the information—as, indeed, the Government has already done in response to the several hundred questions which we answered in the course of the discovery proceedings—but, in addition, the verbatim

ranscript of the grand jury testimony through which the iovernment acquired such information. But if there was io abuse of the grand jury process, and the Court's opinion of April 17th states that the legality of the procedure followed here is not in issue, would not the defendants' argument, if accepted, logically require that not only the information obtained through grand jury investigation, but also information obtained by the Government through other investigative means, including FBI reports, be furnished to the defendants in verbatim form?

[fol. 1536] Let us put the shoe on the other foot. Undoubtedly, during the period of the grand jury investigation there were two investigations being conducted simultaneously, one by the Government, with the grand jury, and one by the defendants. Let us assume, for the sake of argument, that most of the witnesses who appeared before the grand jury—and the defendants' briefs indicate that they were well known to the defendants—were questioned by counsel for the defendants, as well as by the grand jury. It is customary for counsel to make a written record, in the form of notes and memoranda, of the facts ascertained in this fashion in preparation for possible litigation. It is reasonable to believe that the record of the investigation conducted by counsel for the defendants contains information additional to that contained in the record of the grand jury investigation. It is fair, if the Government is compelled to turn over the record of the grand jury investigation to defendants, that the defendants should have the use in this proceeding of their own record of investigation without such record being made available to the Government? If we were to apply the liberal policy of the discovery rules without recognition of the public policy and public interest underlying the [fol. 1537] limitations which are imposed, it would of course follow that all information gathered by both sides should be subject to pretrial disclosure.

The Court: But you are afraid the defendants will invoke Hickman v. Taylor?

Mr. McDowell: Yes, your Honor.

The Court: Work product?

Mr. McDowell: Yes, your Honor. And in that case, 392 U. S. 495, the Supreme Court held that public policy

imposes limits on discovery and prevents just that kind of discovery even in the absence of any formally recognizable privilege.

And that language, I may say, your Honor, is quoted in the brief which the Government had submitted earlier. It is very interesting to note that the Court did not place its ruling upon some specifically definable privilege but rather on the fundamental underlying public policy governing our system of litigation. If fairness is to be the test here, let us frankly recognize that the advantage is all on the side of the defendants, so far as knowledge of the facts is concerned, since it is their conduct that is in issue and they are, of course, in possession of full knowledge with respect to the conduct.

In summary, Your Honor, we think this situation falls [fol. 1538] squarely within the procedure in the situation which was described by the Supreme Court in the Reynolds case, and that is—may I quote briefly from page 11:

"In each case the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege, made under the circumstances of this case, will have to prevail."

We feel very strongly that in the absence either of such a showing of necessity, or of some abuse; some showing of abuse, sufficient to invoke the supervisory responsibility of the court over the conduct of the grand jury, the state's interest in preserving the integrity of the grand jury system is superior to the convenience of the parties, superior to the interests of any individual litigant or witness, superior to any individual case, including this case. We believe that it is the right and duty of the Attorney General to assert and advocate this public interest. The defendants cannot be expected to do so, and the Court cannot be expected to advocate it, for it is for the judge to weigh the merits of the different contentions and decide. [fol. 1539] The basic objection lies in the fact that disclosure of the minutes of an entire grand jury investigation would constitute a notice to future witnesses, not merely in antitrust investigations, that their testimony may be

disclosed at some future time, wholesale and complete. The effects of such a notice—upon witnesses in future investigations—and upon grand jurors, too, if full disclosure of the entire proceedings of a grand jury, apart from deliberations, is contemplated.

The Court: You mean how they voted on a particular matter?

Mr. McDowell: No, apart from deliberations. But if the entire record of what was put before them is to be disclosed.

The question was raised as to whether or not this proposal does not contravene equally fundamental considerations for the protection of the grand jury system noted in the Rose case, another decision. Having due regard for the uncertainties of life, many witnesses would realize that their relationship to those under investigation, either then or at some future time, might subject them to retaliation or disfavor for any unfriendly or disloyal statements, and they would be likely to speak less frankly and fully.

[fol. 1540] We submit that what is proposed here is not merely the application of the presently recognized exception which permits limited disclosure of specific grand jury testimony in exceptional cases and under the compulsion of necessity, but rather a new and sweeping exception for discovery purposes. Any such change should be very carefully weighed if there exists the slightest possibility of an adverse effect upon the ability of future grand juries to hear the full truth. The Government and the Court have each the duty of protecting the integrity of the grand jury system and of protecting grand jury witnesses in that confidence which society has considered necessary to encourage witnesses to speak fully, freely and honestly.

Thank you.

Statement by Mr. Correa

Mr. Correa: If your Honor please, the temptation to make reply to the argument of counsel for the Government, which is so answerable in so many aspects, is almost irresistible. But one has to keep in mind your Honor's original admonition at the outset of this hearing this morning when your Honor pointed out that this was rehearing. And as I understood the Court's definition of

rehearing or reargument—and it coincides or accords with what I had always understood to be the function of reargument—reargument is not for the purpose of repeating [fol. 1541] and reiterating arguments which have already been made, and on the basis of which decisions have been taken by the courts. Rearguments, as I understand it, are for the purpose of calling to the Court's attention some new matter of fact or law which might conceivably affect the decision already rendered and cause the Court to perhaps reach a different decision.

Now, I have listened patiently and carefully, I have made many notes here, and I have followed Mr. McDowell's presentation in his own briefs, as well as in the minutes of our prior argument, and I find absolutely nothing that is new, that hasn't been fully argued to your Honor orally, or briefed by us, or our co-defendants, or by the Government, which hasn't been called to your Honor's attention well before the decision of this matter.

So that therefore, your Honor, with some reluctance, I must confess, because it is hard to resist the opportunity, but still in justice to the Court, and out of consideration for the points, or the matters which your Honor raised about wasting your Honor's time, these gentlemen's time, and this lady's, or our own time, we have decided—and I am authorized, I believe, to speak for my colleagues—to make no further argument, or to repeat the arguments we [fol. 1542] have heretofore made, save on any aspect of the matter which your Honor may wish us to address ourselves to specifically.

The Court: I am glad you feel that way about it. And I guess you know by the question I put to Mr. McDowell what really is bothering me now. It was not my intention, of course, to turn over the grand jury minutes to the defendants for the purpose of convenience. My purpose was to turn them over in the true spirit of the discovery rules of federal civil procedure. One of them, of course, is that you can get the information yourself, by other means available, you can't have the grand jury minutes, you realize that.

Mr. Correa: Certainly, if there were other practical means, if your Honor please. But "other means" does not mean any possible means, it means other means that

are practicable and reasonably to be followed. And there are no such other means here, if your Honor please.

The Court: Well, suppose, as the Government has already intimated—that is, the Department of Justice—they are willing to give you the names of all the witnesses who testified before them? And many of them are employees of yours, or one of the co-defendants, whom you can get the information from. Then what?

[fol. 1543] Mr. Correa: Well, as your Honor has pointed out, the considerations are precisely the considerations that your Honor has emphasized. As your Honor knows from your own practice, you can get a man five minutes after he comes out of the grand jury room, and have him sit down and dictate to a stenographer his best recollection of everything that went on and it will still vary widely from what actually happened. And that is the normal fallibility of human recollection and there is no adequate substitute in this case. Further than that, the makeshift substitute—because that is all it would be—would be dreadfully makeshift, because we have the name of John Doe, let's say, and he is a witness and was a witness before the grand jury, and we can go find John Doe and examine him. On what? Every issue that you could conceivably raise under the antitrust laws, or at least under that part of them pertaining to the Sherman Act. Because if you read that complaint—or, as your Honor has read this complaint, your Honor appreciates that the complaint here raises every possible issue on every aspect of the defendants' business—their buying, their selling, their advertising, their pricing, their sales promotion, just everything they do, across the board. Now, did John Doe testify on one narrow aspect of this, or on all of them, or on half a [fol. 1544] dozen of them, or are we going to sit with John Doe for hours and days on end, and then with whatever number of John Does there are for hours and days on end, in distant parts of the country, and all this could be obviated? I don't think the rules of civil procedure were intended to require resort to that kind of proceeding, especially in view of the fact that when you get all done, for the reason your Honor has mentioned, and the reason we have mentioned, you are never going to get the thing that you really want and that you are entitled to, and that

is what the man's recollection was, and what he testified to at the time he gave his testimony actually in the grand jury room. You will never get that, in most cases.

The Court: But the cases do hold that if you can obtain the information yourself you are supposed to get it, aren't you?

Mr. Correa: If you can, yes, if your Honor please. But here there is no workable alternative. We have explored that thoroughly and there just isn't any workable alternative.

The Court: You see, I can appreciate this, Mr. Correa, in the case where a man might be before the grand jury a whole day, you can't expect the gentleman to tell you what he testified to for a whole day before a federal grand [fol. 1545] jury, or any other grand jury. You know, yourself, where lawyers forget tomorrow what they said the day before the trial of a case, and then they rag the witness because he can't remember what he said four years ago. I realize that and I had that in mind. I had many things in mind while I was writing this opinion, particularly since for seven years I presented cases to the grand jury in a metropolitan county, and I probably know more about the problems of the grand jurors from personal contact than a lot of lawyers do academically.

Mr. Correa: I spent five years at it, if your Honor please.

The Court: You know what I am talking about. I could have a witness testify this week, and I would call him the next week on the same subject and he would give me a totally different story, and if I called him the next week he would give me another story, a third version of what happened. And I experimented many times in that regard, so I could see how witnesses' minds operate. And I used to say to myself, "Now, imagine this man being under cross-examination. Here he is with a friendly prosecutor, just trying to elicit information, and he gets mixed up and excited." What would he do with a good lawyer like you cross-examining him? He would be sorry he [fol. 1546] ever saw the thing, or ever heard about it, which is the attitude of most witnesses, anyway.

Mr. Correa: If your Honor please, I have had the oppor-

tunity, years ago, in the Louis Lieb disbarment of comparing the actual grand jury transcripts with a series of memoranda made by a very experienced lawyer of many years practice, and these memoranda were made by this lawyer immediately after he came out of the grand jury, went right down to his office and dictated a memorandum for the benefit of his advisers, his lawyers, and, believe me, there was a world of difference between the two. Now, this wasn't any ordinary witness, this was a man who you would expect, if anybody could render accurately what had transpired, would be the best bet to do it.

The Court: Yes. Well, the only reason I bring this up, I will tell you frankly—you know, I am a very blunt man and I think out loud—when I was writing this opinion many things were going through my mind, of the possible consequences of what I was going to determine. But I knew there were higher courts than me, maybe much wiser judges, brilliant jurists, who might disagree with Judge Modarelli about the situation. It was not my intention, of course, to tear the curtain right off the grand jury for any purpose. [fol. 1547] I thought that my opinion was very careful, and I was only judging the facts in this case, and this type of litigation. That is all.

Mr. Correa: Your Honor, I was struck by counsel's argument, that whenever he referred to any of the precedents, particularly those in our favor, they had to be held down very narrowly to the precise situation before the Court. But when he talks about your decision——

The Court: Yes, and if you were on the other side you would talk just like Mr. McDowell and if Mr. McDowell was on your side he would talk like you. I have learned that as a Judge a long time ago. I have seen these government men when they represent the Government and then three years later they come in representing a private litigant, and what a change in philosophy. It's incredible. I was young then, I didn't know any better. But they argued just as vociferously as they did later on a counter proposition. That doesn't overwhelm me.

Mr. Correa: But I wish merely to point out, when counsel talks of your decision he speaks of it as if it were the broadest possible application, and applied to cases under

the Internal Security Act, the Subversive Activities Con-
[fol. 1548] trol Board, we got into racketeering, we were in proposed—not even actual, but proposed civil rights legislation, and all kinds of fields, which, to my mind, have no conceivable relation to anything that is before the Court here. This is plainly a decision tailored, as your Honor has so plainly put it, to the needs of the Big Case, the big antitrust case, in an antitrust case where the Department of Justice has done what the head of their antitrust division has said in sworn testimony before a congressional committee it is their practice to do, that is, use the grand jury for the purpose of pretrial, precomplaint investigation and preparation of their case. And indeed, in the excerpt from his testimony, which your Honor quotes in one of the footnotes to your opinion, your Honor will recall, he equates—investigation by the process of the grand jury on the one hand, and filing a complaint and investigating under the rules, under the civil rules on the other; he equates them, he says: These two, plus voluntary cooperation of the defendant, are the three ways in which we investigate a civil case. That is what this case is all about. We are not talking here about the Subversive Activities Control Board, or racketeering statutes, or any of these other things.

[fol. 1549] The Court: Is there anything else you should answer, raised by Mr. McDowell, if he did raise anything new?

Mr. Correa: Well, if your Honor please, sure, there are many things that should have been answered and have been answered. Now, I am willing to go back over any parts of the argument——

The Court: I don't want you to go over anything.

Mr. Correa: —that your Honor thinks he would like to have your recollection refreshed concerning.

The Court: Well, did you get the impression from my opinion that I was just going to throw upon the entire grand jury proceedings to you in this suit?

Mr. Correa: I got the impression, if your Honor please, that we were to have the transcript of the testimony of witnesses.

The Court: Of all the witnesses who appeared before the grand jury in connection with this case, is that right?

Mr. Correa: That's right, if your Honor please.

The Court: And without any safeguards of any kind attached to that, in consideration of the public policy that may be involved?

Mr. Correa: Well, I certainly thought your Honor had considered the considerations of public policy—you very [fol. 1550] carefully discussed them—and, in my own humble opinion, had come out with what I regarded as the correct conclusion.

The Court: Well, of course, the side that prevails has always said that, you know. The side that doesn't prevail thinks the Judge doesn't know his business.

Mr. Correa: Well, if I may be permitted to express a personal opinion, as one who has had some experience prosecuting cases before grand juries, and has been chargeable with the prosecution of crime in a neighboring district, that I still think it is the right result, in this kind of case, because if the Department of Justice is going to use the grand jury as an adjunct to the preparation of civil cases, then the principles that the Supreme Court of the United States has laid down for the trial of civil actions in the courts of the United States ought to apply. To my mind, it is as simple as that. And they are using them, using the grand jury in that way. They stated it; they say there is nothing wrong with it. Maybe there isn't anything wrong with it.

The Court: Maybe there is no other way they can do it, either.

Mr. Correa: Maybe that is so. That has certainly been [fol. 1551] the testimony of various heads of the antitrust division. And they have asked for alternative ways and have up to now always been unsuccessful in getting them from Congress. But the point is, if they are going to use them, then this ought to be treated as a proceeding in a civil case and the rules, as your Honor has pointed out, whatever the law was before 1938, in 1938—and it was quite different, as your Honor recalls—in 1938 the Supreme Court said, "We are not going to do it on a trial by battle basis any more, and the fellow who can hide something to the last minute, and then surprise his adversary and catch him

flatfooted in the middle of a trial prevail." The Supreme Court said everybody gives up everything, in effect. And we have been operating under those ground rules ever since. And the Government is no exception.

The Court: Disgorge is the term they use.

Mr. Correa: Disgorge, precisely.

The Court: Even if your client thinks you are selling him out, you have to give all the information.

Mr. Correa: You have got to do it.

If there is any other aspect of the case, if your Honor please, to which you would care to have us address ourselves—have me address myself, or my colleagues—we would be glad to do it. But, as I say, it is repetition.

[fol. 1552] The Court: I don't want you to repeat.

Mr. Correa: The business of the Reynolds case, which is a state secret case——

The Court: I considered the Reynolds case, and I didn't even mention it in the opinion, because I didn't see what it had to do with what I was deciding here. I didn't even mention it. I didn't see what it had to do with discovery proceedings.

Mr. Correa: I don't believe it has anything to do with our question here, if your Honor please.

The Court: If any questions arise in my mind I shall probably address a letter to you, because I will have to have what the Assistant Attorney General argued this morning transcribed. If I have any questions that I want answers to from you gentlemen I will write you a little note, and you will get a copy of it.

Mr. Correa: Thank you, your Honor.

COLLOQUY

Mr. McDowell: May I say two or three words more, your Honor?

The Court: Well, let's see whether the defendants want to say anything first in answer to what you said.

Mr. Fortas: If your Honor please, I don't think any purpose would be served by my addressing myself to the argument of Government counsel. I followed it with the [fol. 1553] greatest care. Before coming to the courtroom today I started to make a list of the points in the previous

papers in which the Government had previously made all of the arguments that they listed in the papers that they filed in connection with this so-called claim of privilege. The list is quite formidable, quite long. They have all been before your Honor. Your Honor's opinion makes it very clear that your Honor's decision is based on the narrow circumstances of this case. Your Honor has made it abundantly clear that this is an opinion that is fitted into the framework and the necessities of this Big Case.

As I listened to Mr. McDowell's very general statements about depositions here of all of these witnesses I confess that I had a sense of shock and wondered whether this was slightly argumentative because I am sure that if you begin appraising those remarks we would have before us the prospect of ten years of inadequate, unrewarding procedure, which is just exactly what your Honor has tried to avoid from the very first day this case came before you.

Thank you.

The Court: I am glad you understand my motives, Mr. Fortas.

Mr. Fortas: You made it perfectly clear in your opinion. [fol. 1554] The Court: In other words, I don't want to make a burdensome Big case more burdensome for anybody. It is bad enough at its best, in plain English, whether you represent the Government or the defendants.

Mr. Fortas: These arguments that the Government has made here are exactly the arguments they made during all the years when they refused to allow access to grand jury testimony to a fellow who was on trial for perjury because of what he said in the grand jury itself, and it took a court decision to make them change that position. And meanwhile they were shouting to the high heavens that the Government will come to an end, our system of justice will be terminated, and that this will be such a terrible precedent that nobody can see anything except disaster at the end of the road.

The Court: I have made that speech many times.

Mr. Fortas: Yes, sir; so have I.

The Court: And all those horrible consequences that were going to come from decisions made by judges never

came to pass yet. All these calamities that were going to come, they don't seem to come.

General Royall, is there anything that impresses you that you think you should comment on, that Mr. McDowell raised that you think he has not raised hereto?

[fol. 1555] Mr. Royall: Well, I am sure there is nothing he has not raised before. I have been following it very closely, along with my colleagues, to see if there were any new matters, and it was our mutual decision that the matter has been covered both by previous arguments on both sides, briefed and re-briefed, and that your Honor has given it careful and painstaking consideration, that you had dealt with every facet of his discussion and had disposed of it. We didn't oppose him asking for a rehearing, or rearguing. We listened to see if there were any new thoughts. The only thing that has given me any pause to say anything is the fact that your Honor seemed to think there might be some substitute for the grand jury, but that was clarified in your Honor's opinion. The Government was the first to ask for and obtain—to obtain by process the evidence of the witnesses. They thought it was necessary. They used it to bring the case, and to prepare the case, as well as the other documents, and got the advantage of it.

Your Honor simply said, in your opinion, that the matter having been put in the civil field—and I add to that, at the instance of the Government—the rules require that we have the same information. We are entitled merely, your Honor, to what we would get in a regular case. There is [fol. 1556] no more violation possible of the secrecy of the grand jury in what we desire, not as much, as in what they have already done—the Government has. I am not arguing that they shouldn't, but they are the ones that chose that method of preparation, the grand jury—five years ago, your Honor. And without the same testimony they have we would be at a disadvantage.

And, as Mr. Fortas so tellingly said, I can think of few things that would complicate and prolong this case more than to seek a substitute for the simple evidence that the Government itself has used.

We get that and this case ought to be simplified more

than by any single factor that I know. And I don't want to argue it any further.

Mr. Welch: Your Honor, just for the purpose of the record, on behalf of the Association I would like to announce that we are in thorough accord with the position taken by the manufacturing defendants.

Mr. Royall: Your Honor, I will ask this, that if any new points are now to be made, I may want to answer them, if Mr. McDowell is going to make any other points. If he confines himself to those, we have already answered.

Mr. McDowell: It seemed to me, your Honor, that counsel hesitated a bit when the Court asked him whether counsel [fol. 1557] had gotten the impression that your opinion proposed a sweeping disclosure of the transcripts of this grand jury investigation without any safeguards of any kind. That is precisely the way we view your Honor's opinion. And I may say that it would appear from the order which they drafted that the defendants viewed it in exactly that same light. I might quote the order. It requires that the plaintiff "within thirty days from the entry of this order produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Procter or its counsel to inspect and copy by photostating or other means all or any part of the transcript of the testimony of all witnesses who appeared before the said grand jury."

There is nothing said about any safeguards or limitations of any kind.

The Court: Well, I made no assertions, I only asked questions to see what you all thought I meant by my opinion. I know what I thought I meant. I haven't said it yet here, but when the order is submitted you will know what I really meant.

Do you have a counter order to offer?

Mr. McDowell: No, sir. We have given no consideration to the order yet.

[fol. 1558] The Court: Because it might be interesting to see what kind of an order you would submit. You apparently don't like the one the defendants have submitted, because you think it is too sweeping. Now, let's see what you would submit.

Mr. McDowell: Well, we felt it unnecessary to cross that bridge before we came to it. There is now here before the Court not reargument of the original motion, but a motion for a ruling on a formal claim of privilege and for reconsideration in the light of that claim.

And I regret very much that I have apparently failed to indicate the bearing which the Reynolds case has on our situation here because, as we understand it, the Reynolds case is squarely in point. It was in the Reynolds case that the Supreme Court stated the procedure which would be appropriate after the trial court has originally found good cause on a discovery situation, even though the possibility of disclosure of military secrets was argued—the court, then when a claim a privilege was filed the Supreme Court said it becomes incumbent upon the court too to weigh a showing not merely of good cause but of necessity for the production of the precise document as against the appropriateness of invoking the claim of privilege.

[fol. 1559] The Court: Mr. McDowell, can I impress upon you that when I wrote this opinion I had one type of litigation in mind—an antitrust suit. I am not worrying about a suit involving an Air Force plane, I am thinking about an antitrust suit, something that is tailored for antitrust suits alone, unless we are going to live a lifetime in trying one a generation.

Mr. McDowell: Your Honor, we would take a less serious view of this matter if we thought that the result of any ruling that the transcript of a grand jury investigation is to be disclosed could be limited to antitrust situations.

The Court: Well, if somebody tries it in another situation, and another judge agrees with me, we can't all be wrong. And if—God permitting—the Circuit Court would agree with me and the Supreme Court would agree with me, then I am not wrong.

Mr. McDowell: Quite true, your Honor.

The Court: I am not the final authority on whether this is the right procedure or not. I think, conscientiously and honestly, that in this type of case this is a proper procedure. And I concede that some other jurists might disagree with me violently. And that doesn't bother me. The Supreme Court disagrees five to four more often than not, and one vote decides what is the law of the land. And

ol. 1560] that one vote that decides it might be dead ong, but that decides it, five to four. I am not stubborn ough to say that no other judge might disagree with me. may, unquestionably, and maybe also give good philos- hy why he thinks I am wrong—that even in the long e, let it be longer. Let justice prevail, even though the avens fall. As I said this morning, if the heavens fall, u don't have to worry about justice, because the earth ll disappear. We don't have to worry any more once the avens fall, that is the end of the earth.

Mr. McDowell: Your Honor, we pointed out that other urts have disagreed. We recognize, of course, that your onor must reach his own decision. But we would be relict if we did not point out——

The Court: Don't you get the impression that I resent fact that you are pointing things out to me. That is ur sworn duty.

Mr. McDowell: And we would be derelict if we did not ing to your Honor's attention the statements made by Supreme Court in the Reynolds case, particularly in ew of the close parallel where the court pointed to the et that the defendants, having the names of the survivors uld, of course, take their depositions or interview them d obtain the necessary information, or at least there ol. 1561] was no showing, as distinguished from argu- ent, that they could not so obtain the necessary formation.

The Court: Now, that was one plane, wasn't it; one plane volved?

Mr. McDowell: Yes, sir. And here is a grand jury with or 30 witnesses, 18 of whom were officers or employees the defendants; and the others of whom, with perhaps e or two exceptions, are people who do business regularly th the defendants. So that the situation is not so vastly fferent.

The Court: Then why does it take so long to get an anti- ust suit to issue, and why does it take so long to try an ntitrust suit, if there are only 28 or 35, or 40 witnesses volved? They go on for months, months and months. I ad in one trial how many children were born of the wyers involved in the suit, how many died while the suit

was pending—I recall that distinctly. Then why does it take so long, if there are so few witnesses?

Mr. McDowell: I don't think it follows, your Honor, that there would be only 28 or 30 witnesses at the trial of the case.

One additional point which I think must be emphasized because it has come up again in this colloquy between the [fol. 1562] Court and counsel. I think it is unfortunate if this case should be decided on a false premise, and I submit it is a false premise to view the grand jury investigation here, as it has been repeatedly referred to, as an action by the Government, a device used by the Government for the sole purpose of obtaining information for a civil action. Ever since the Standard Sanitary case, where the Supreme Court confirmed the exercise of the Government's discretion, it has been practice to use grand juries to investigate violations of the Sherman Act.

The Court: I know that.

Mr. McDowell: And the government has quite properly had the election under the statute of determining at the conclusion of such an investigation whether to bring a civil action or to ask for an indictment, or perhaps proceed in both ways.

Here there is an affidavit on file with the Court by counsel that this proceeding was instituted for the purpose of investigating violations. And I think it would be unfortunate if we were to have any countenance given to the suggestion that the Government has deliberately abused the grand jury process for the sole purpose of obtaining facts and information for civil action.

The Court: Did the Supreme Court say it's all right?

[fol. 1563] Mr. McDowell: The Supreme Court said in the —there are two decisions by the Supreme Court.

The Court: That it is proper?

Mr. McDowell: The Supreme Court said in the Standard Sanitary case——

The Court: Did they say it is proper to do it?

Mr. McDowell: It is proper for the Government to have an election as to what procedure to follow.

The Court: That settles it then. Who am I to question that?

Mr. McDowell: And the Supreme Court said in the Wal-

ce & Tiernan case that the mere fact that the grand jury that the information had been obtained through even n illegally constituted grand jury could not prevent the overnment from having the use of that information in a vil proceeding.

The Court: That settles that, even an illegally constituted rand jury.

Mr. McDowell: Your Honor, one word about the Rules f Civil Procedure.

The Court: Yes, I would like to hear you more on that, he spirit of the rules.

Mr. McDowell: Since the adoption of the Rules of Civil rocedure in 1938 we have had recognition of the liberal olicy of making facts available. But there have been fol. 1564] decisions since that time showing the limitations pon that discovery. They are not without limitation. nd I think it is most significant that the Criminal Rules, nder which we are operating with respect to the grand ury secrecy provision, was adopted in 1945, and that rule, dopted in 1945, seven years after the adoption of the ules of civil discovery, continued the policy of grand jury ecrecy. And the adviser's note said it was intended to ontinue the traditional practice.

We submit that it was well known and that it was the ractice of the Government to use grand juries to investiafe violations of law and that under the decisions by the upreme Court it is immaterial whether as a result of the nvestigation the Government brings a civil proceeding here under the statute the Government is required to do o. It does not affect, in any way, the propriety of the se—and it has never been considered by the courts which ave considered this question prior to this decision here—nd there have been four—that that required that the transcript of the grand jury investigation be turned over to the efendants for discovery purposes.

Thank you.

The Court: You are right, I didn't find any case where fol. 1565] any judge ever ordered that.

Mr. Royall: Your Honor, I am not arguing any more bout it. It is awfully tempting, though, with all these ew things being injected every time Mr. McDowell gets p. We are going to abide by our decision and rest on

the discussions that have been previously had and the briefs that were previously filed.

I want to make one inquiry only. Your Honor said something about the form of the order. We have tendered one, and we tendered it before any motion for rehearing had arisen.

The Court: Had been contemplated?

Mr. Royall: Well, we didn't know whether it was contemplated, but it hadn't come. In fact, we did not know it was going to be brought. And therefore we had a very short order, in accordance with your opinion.

Now, as I understand, your Honor would like us to tender another order in more elaborate form?

The Court: Well, no, you don't have to now. Let's see what kind of an order the Government is going to submit after I decide this matter. If you can't get together, then we will argue an order.

Mr. Royall: One other thing. As I understand it, you don't wish us to submit any more memoranda.

The Court: Please no.

[fols. 1566-1567] Mr. Royall: That's what I thought. But I wanted to be sure I understood that correctly.

The Court: I have never read as many memoranda in my life as I have read in this matter.

Mr. Royall: We would have to repeat, if we did.

The Court: Yes, and I don't want you to repeat. I hate monotony, General. It even goes in the law.

Mr. Royall: All right.

The Court: I shall consider everything you have said, Mr. McDowell. And in addition thereto I promise you I shall reread that Reynolds case and see whether I really miss your point or whether you miss mine. But either one of us is wrong. And that is not unusual.

And then I will let you know in a short time, probably by letter. I don't intend to write any more opinions, because I have got other undecided cases and summer is coming on.

I shall drop you a note and tell you what I am going to do with your re-argument question based on privilege and everything else.

[fol. 1568] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

APPLICATION FOR LEAVE TO FILE MOTION ON LESS THAN 15 DAYS NOTICE TO DEFENDANTS

Plaintiff applies to the Court for leave to file the attached Motion To Amend Or To Stay Order of July 24, 1956, together with accompanying papers, upon less than 15 days notice to the defendants. The reason for such application is that the motion seeks amendment or stay of an order whose effective date is August 24, 1956 and that 15 days notice cannot be given to the defendants. Copies of the motion have this date been served upon counsel of record for the defendants.

George J. Rossi, Assistant United States Attorney.

Dated: August 16, 1956.

[fol. 1569] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ORDER GRANTING LEAVE TO FILE MOTION, ETC.—August 16, 1956

Upon consideration of the foregoing Application For Leave To File Motion Upon Less Than 15 Days Notice To Defendants, it is

Ordered that the foregoing application be and is hereby granted, and the Clerk hereby is directed to accept and file said motion.

A. E. Modarelli, U.S.D.J.

Dated: August 16, 1956.

[fol. 1570] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF MOTION—Filed August 16, 1956

To: O'Mara, Schumann, Davis & Lynch, 1 Exchange Place, Jersey City, New Jersey.

Bailey & Schenck, 1180 Raymond Blvd., Newark 2, New Jersey.

Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey.

McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey.

Please take notice that the undersigned will bring the within motion on for hearing before this Court at the Federal Building, Newark, New Jersey, on the 21st day of August at 10:00 A.M., or at such other time as the Court may order.

Joseph E. McDowell, Attorney, Department of Justice.

Dated: August 15, 1956.

[fol. 1571] Service of a copy of the foregoing Notice of Motion is acknowledged this day of August 1956.

O'Mara, Schumann, Davis & Lynch, Bailey & Schenck, Toner, Crowley, Woelper & Vanderbilt, McCarter, English & Studer.

[fol. 1572] AFFIDAVIT OF SERVICE

This is to certify that I have this date served copies of the foregoing motion and notice of motion upon each of the following counsel:

Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York.

O'Mara, Schumann, Davis & Lynch, 1 Exchange Place, Jersey City, New Jersey, Counsel, Colgate-Palmolive Company.

Arnold, Fortas and Porter, 1229 Nineteenth Street, N.W., Washington 6, D. C., Counsel, Lever Brothers Company.

Davies, Richberg, Tydings & Landa, 1000 Vermont Avenue, N.W., Washington 5, D. C., Counsel, The Association of American Soap and Glycerine Producers, Inc.

Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio, Counsel, The Procter & Gamble Company.

Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Counsel The Procter & Gamble Company.

by depositing a copy addressed to each of said counsel in the US Mail in a Government franked envelope

George J. Rossi.

Dated: August 16, 1956.

[fol. 1573] IN UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION TO AMEND OR, ALTERNATIVELY, TO STAY ORDER OF JULY 24, 1956—Filed August 16, 1956

Plaintiff moves the Court to enter an amended order, in the form attached hereto, in substitution for the orders entered in the above-entitled action on July 24, 1956 by the Honorable Alfred E. Modarelli, directing the plaintiff within 30 days to make available to the defendants the transcripts of testimony of all witnesses who appeared before a certain grand jury. Alternatively, plaintiff moves the Court to stay the said orders of July 24, 1956, pending the filing of appeals therefrom to the Supreme Court of the United States and or the filing of an application with that Court for an extraordinary writ, and the final determination by that Court of said appeal and/or application. The reasons for the motion are set forth in the attached affidavit of Herbert Brownell, Jr., the Attorney General of the United States.

(S.) Victor R. Hansen, Assistant Attorney General.
(S.) Joseph E. McDowell, Attorney, Department of Justice.

[fol. 1574] PROPOSED AMENDED ORDER

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company and the Associated Soap and Glycerine Producers, Inc., having filed motions herein on September 24, 1954, November 28, November 28, and November 25, 1955, respectively, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952, insofar as such testimony related to the investigation of antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion filed April 17, 1956, holding that the defendants are entitled to inspect and copy said transcripts of the aforesaid testimony of witnesses before the Grand Jury; and the plaintiff having filed a motion herein dated April 30, 1956 for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for a ruling on plaintiff's claim of privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motions and claim of privilege, and having rendered its opinion, filed July 9, 1956,

[fol. 1575] Now, therefore, it is

Ordered that the motion and claim of privilege of plaintiff be and they are hereby denied; and it is further

Ordered that unless the plaintiff on or before August 24, 1956 produces at the office of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permits each of the defendants or their counsel to inspect and copy, by photostating or other means, all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein.

_____

United States District Judge.

Dated: —— ——, 1956.

[fol. 1576] AFFIDAVIT OF HERBERT BROWNELL, JR.

DISTRICT OF COLUMBIA, ss:

HERBERT BROWNELL, JR., being duly sworn, deposes and says:

I am the Attorney General of the United States and, as such, the chief law enforcement officer of the United States.

I am of the opinion that the order of the Court directing the plaintiff to make available to the defendants the grand jury transcripts is erroneous and that making such transcripts public would be contrary to the best interest of the administration of justice. It is my intention to seek review of that ruling in the Supreme Court of the United States.

The order of the Honorable Alfred E. Modarelli requires the Government to make the transcripts available to the defendants by August 24, 1956. In my considered judgment, it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order.

[fol. 1577] Under these circumstances, I believe that amendment of the orders as proposed in the within motion clearly would be in the public interest. However, if the Court concludes that such revision is not appropriate, I then urge that the orders be stayed until the United States has had an opportunity to file an appeal therefrom to the Supreme Court of the United States and/or to file with that Court an application for an extraordinary writ, and until that Court finally has determined said appeal and/or application.

Herbert Brownell, Jr., Attorney General.

Sworn to before me this 14th day of August, 1956.

Wm. C. Jackson.

My Commission expires 4/14/60. (Seal.)

[fol. 1578] In United States District Court for the District of New Jersey

[Title omitted]

Brief in Support of Plaintiff's Motion to Amend or to Stay Order—Filed August 16, 1956

Statement

From May 1951 until November 25, 1952 a Grand Jury sitting in this district investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. No indictment was returned, but on December 11, 1952 the United States filed a civil complaint charging that since 1926 the defendants have been engaged in a conspiracy in unreasonable restraint of, and to monopolize, trade and commerce in the production and sale of soap and synthetic detergents, and that the three manufacturing defendants have monopolized that trade, in violation of Sections 1 and 2 of the Sherman Act.

In the fall of 1955 each of the defendants filed a motion for an order granting leave to inspect and copy the transcript of testimony taken of all witnesses who appeared before the Grand Jury. That transcript is in the custody of the Attorney General. After argument, the District Court (*per* Judge Modarelli) held, in an opinion issued on April 17, 1956, that the defendants were entitled to inspect and copy the Grand Jury transcripts.

[fol. 1579] On May 3, 1956 the Government moved for reconsideration of that ruling. At the same time, it submitted a claim by the Attorney General that the Grand Jury transcripts ordered to be made available to the defendants were privileged against disclosure. On July 9, 1956 the Court issued an opinion denying the plaintiff's motion for reconsideration.

On July 24 the Court entered the order (dated July 23) which is the subject of the instant motion. That order directed the plaintiff to produce within 30 days at the offices of the Department of Justice, or at such other places as the parties may agree, and to permit each of the defendants or its counsel to inspect and copy, "all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury * * *."

ARGUMENT

Judge Modarelli's order requires the United States to make the Grand Jury transcripts available to the defendants by August 24, 1956. The Attorney General is of the view that that order is erroneous and further that making such transcripts public would be contrary to the public interest in the administration of justice (see his affidavit attached to motion). He has therefore decided to seek review of Judge Modarelli's ruling in the Supreme Court of the United States.

However, Supreme Court review obviously cannot be had by August 24, 1956, the date fixed for compliance in Judge Modarelli's order. We believe that it would be unseemly for the Attorney General, as the chief law enforcement officer of the United States, to be placed in the dilemma either by having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order in order to obtain effective appellate review thereof. Under these circumstances, we urge the Court to enter an amended order which [fols. 1580-1581] provides that if the transcripts are not made available by August 24 (the date previously fixed by the Court), an order will be entered dismissing the complaint. Such an amendment of the order of July 24 would in no way prejudice the defendants, and it would avoid placing the Attorney General of the United States in the dilemma above noted. If such an amended order is entered, the United States intends to appeal from the subsequent judgment of dismissal, as was done in *United States* v. *Cotton Valley Operators' Committee*, 339 U.S. 94 (judgment of dismissal affirmed by an equally divided court).[1]

[1] Cf. *United States* v. *Zucca*, 351 U.S. 91, where the district court entered an order dismissing the Government's complaint in a denaturalization proceeding for failure to file an affidavit of good cause, on condition that if within 60 days the Government filed such affidavit, the complaint would be reinstated. The Government did not file the affidavit, and the court then entered a final order of dismissal. Record on appeal, *United States* v. *Zucca*, No. 213, October Term 1955, pp. 20, 22.

However, if the Court should conclude that the order should not be thus amended, we request the Court to stay the order pending the filing of an appeal therefrom to the Supreme Court of the United States and or the filing with that Court of an application for an extraordinary writ, and final decision by the Supreme Court on such appeal and/or application. Such a stay would not prejudice the defendants, and would similarly avoid placing the Attorney General in the position of having to disobey an outstanding court order as a condition of testing its validity.

Respectfully submitted, (S.) Victor R. Hansen, Assistant Attorney General. (S.) Joseph E. McDowell, (S.) Daniel M. Friedman, Attorneys, Department of Justice.

[fol. 1581a] [File endorsement omitted]

[fol. 1582] In United States District Court for the District of New Jersey

[Title omitted]

Amended Order for Inspection and Copying of Transcript of Grand Jury Testimony, etc.—August 21, 1956

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company and the Associated Soap and Glycerine Producers, Inc., having filed motions herein on September 24, 1954, November 28, November 28, and November 25, 1955, respectively, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey sitting in Newark, New Jersey, from May 1951 to November 1952, insofar as such testimony related to the investigation of antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion filed April 17, 1956, holding that the defendants are entitled to inspect and copy said transcripts of the

aforesaid testimony of witnesses before the Grand Jury; and the plaintiff having filed a motion herein dated April 30, 1956 for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for a ruling on plaintiff's claim of privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motions and claim of privilege, and having rendered its opinion, filed July 9, 1956, [fols. 1583-1584] Now, therefore, it is

Ordered that the motion and claim of privilege of plaintiff be and they are hereby denied; and it is further

Ordered that unless the plaintiff on or before August 24, 1956 produces at the office of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permits each of the defendants or their counsel to inspect and copy, by photostating or other means, all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein.

Alfred E. Modarelli, United States District Judge.

Dated: August 21, 1956.

[fol. 1584a] [File endorsement omitted]

[fol. 1585] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ANSWER TO PLAINTIFF'S MOTION OF AUGUST 16, 1956—Filed August 21, 1956

The defendant, The Procter & Gamble Company (hereinafter designated as "Procter"), answers plaintiff's motion of August 16, 1956, as follows:

As to the first request in plaintiff's instant motion, Procter says that the order herein dated July 23, 1956, is a proper and sufficient order at this stage of the proceed-

ings. However, without waiving this position, Procter further states that the plaintiff's proposed relief of production or dismissal does not seem to be relief which Procter could in any way oppose.

This makes unnecessary a discussion of the alternative order proposed in plaintiff's motion, which alternative, if it had come before the Court for consideration, Procter would oppose.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbuilt, By John C. Ackerman, per HAL, 810 Broad Street, Newark, New Jersey, (S.) Richard [fols. 1586-1587] W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 12th floor, Union Central Building, Cincinnati 2, Ohio, (S.) Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1587a] [File endorsement omitted]

[fol. 1588] In the United States District Court for the District of New Jersey

[Title omitted]

Affidavit of Robert D. Larsen.—Filed September 13, 1956

State of New York,
County of New York, ss:

Robert D. Larsen, being duly sworn, deposes and says:

I am an associate in the Washington office of the law firm of Dwight, Royall, Harris, Koegel & Caskey, 500 Wire Building, 1000 Vermont Avenue, N. W. Our firm represents The Procter & Gamble Company in the above-entitled proceedings.

On the afternoon of August 24, 1956, I presented myself at the offices of Daniel Friedman, Esq., one of the attorneys representing the United States in the above-entitled matter, whose offices are in the Antitrust Division of the Department of Justice, Washington 25, D. C.

At the aforementioned time and place, I personally talked to the aforesaid Daniel Friedman and stated that I was instructed and authorized by Kenneth C. Royall, Esq., a member of the above-named firm, to secure from the De-
[fol. 1589-1590] partment of Justice, on behalf of our client, The Procter & Gamble Company, the transcripts of the Grand Jury testimony involved in the soap antitrust case in which The Procter & Gamble Company was a defendant, and I requested production of said transcripts.

Mr. Friedman asked to be excused, stating that he would like to confer with his colleagues in the Department of Justice before taking action on my request.

A short time later, the aforesaid Daniel Friedman returned to his offices and stated that the plaintiff would not produce the transcripts.

Robert D. Larsen.

Subscribed and sworn to before me this 5th day of September, 1956.

Evelyn M. Hopkins, Notary Public of New York. (Seal.)

[fol. 1590a] [File endorsement omitted]

[fols. 1591-1592] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

against

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, Lever Brothers Company and The Association of American Soap and Glycerine Producers, Inc., Defendants

JUDGMENT—September 13, 1956

It appearing to the Court that plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcripts of the Grand Jury testimony referred to in the prior Orders of this Court,

Now, therefore, on the record in this case it is

Ordered, Adjudged and Decreed that, as to the defendant The Procter & Gamble Company, this action be and the same is hereby dismissed.

Dated this 13th day of September, 1956.

A. E. Modarelli, U. S. District Judge.

[fol. 1592a] [File endorsement omitted]

[fols. 1593-1594] In the United States District Court for the District of New Jersey

Civil Action No. 1196-52

United States of America, Plaintiff,

against

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company, and The Association of American Soap & Glycerine Producers, Inc., Defendants

Judgment—September 13, 1956

It appearing to the Court that plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcript of the Grand Jury testimony referred to in the prior orders of this Court,

Now, Therefore, on the record in this case, it is

Ordered, Adjudged and Decreed that, as to the defendant, The Association of American Soap & Glycerine Producers, Inc., this action be and the same is hereby dismissed.

Dated: September 13th, 1956.

(S.) A. E. Modarelli, U. S. D. J.

[fol. 1594a] [File endorsement omitted]

[fol. 1595] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, Lever Brothers Company, and The Association of American Soap & Glycerine Producers, Inc., Defendants

ORDER OF DISMISSAL—September 13, 1956

It appearing that Plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcripts of the Grand Jury testimony referred to in the Order of this Court as amended on August 21, 1956.

Now Therefore, upon consideration of all of the prior proceedings had herein, it is

Ordered, Adjudged and Decreed That, this action be, and the same is hereby dismissed.

(S.) A. E. Modarelli, U. S. D. J.

Dated: September 13th, 1956.

[fol. 1595a] [File endorsement omitted]

[fol. 1596-1597] IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

against

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, Lever Brothers Company, and The Association of American Soap & Glycerine Producers, Inc., Defendants

JUDGMENT—September 13, 1956

It appearing that the plaintiff has failed to produce on or prior to August 24, 1956, for inspection and copying

by the defendants the transcripts of testimony of witnesses before the Grand Jury of this Court referred to in the order of this Court entered herein on August 21, 1956; after due deliberation, upon all proceedings heretofore had herein, it is

Ordered, Adjudged and Decreed that this action be and the same hereby is dismissed.

Dated: September 13th, 1956.

(S.) A. E. Modarelli, U. S. D. J.

[fol. 1597a-1605] [File endorsement omitted]

[fol. 1606] In United States District Court for the District of New Jersey

[Title omitted]

Newark, New Jersey.

Transcript of Hearing—July 23, 1956

Before The Honorable Alfred E. Modarelli, U. S. D. J.

Appearances:

Herman Scott, U. S. Attorney, District of New Jersey, By George J. Rossi, Assistant U. S. Attorney; Joseph E. McDowell, and Raymond M. Carlson, Attorneys, Department of Justice, Attorneys for the Plaintiff.

Toner, Crowley, Woelper & Vanderbilt, Attorneys for defendant Procter & Gamble Company, By Marshall Crowley; Dwight, Royall, Harris, Koegel & Caskey, of Counsel By Kenneth C. Royall and H. Allen Lochner; Dinsmore, Shohl, Sawyer & Dinsmore, of Counsel, By Richard W. Barrett.

O'Mara, Schumann, Davis & Lynch, Attorneys for defendant Colgate-Palmolive-Peet Company; Cahill, Gordon, Reindel & Ohl, of Counsel; By Mathias F. Correa, and James Henry.

1607] Bailey, Schenck & Bennett, Attorneys for de-
ant Lever Brothers Company, By Alexander T.
enck; Arnold, Fortas & Porter, of Counsel, By William
IcGovern.

cCarter, English & Studer, Attorneys for the Associa-
By Augustus C. Studer, Jr.; Davies, Richberg, Tyd-
Beebe & Landa, of Counsel, By Adrien F. Busick.

r. Correa: If your Honor please, we have an order
he Colgate discovery motion which your Honor de-
l and then heard on reargument, and has subsequently
ded on reargument.

he order is in form agreed to by the Government and,
rally, by ourselves. And we respectfully submit that.

Document handed to the Court.)

he Court: Do you mind if I just take a look at this?

r. McGovern: Your Honor, I think that they are all
tantially the same in form.

r. Fortas, of our firm, is out of the country and has
since the date of your Honor's decision. I have one,
milar form, consented to by the Government, on behalf
1608] of Lever Brothers Company.

Document handed to the Court.)

r. Royall: Your Honor, we have a form, also submitted
he Government, and approved as to form by the Gov-
ment, and signed by counsel for all parties.

Document handed to the Court.)

r. Busick: On behalf of the Association, your Honor,
present an order, the form of which has been approved
he Department.

Document handed to the Court.)

he Court: Are there any more to be submitted?

r. Correa: I think that is the lot, if your Honor please.

he Court: Mr. McDowell, would you like to be heard?

r. McDowell: May it please the Court, at the same time
the Attorney General instructed me to sign the consent
he Government to the form of this order he also in-
ted me to ask that the orders be presented in open

court so that I might state the position of the Government with respect to his order and the subject.

The Court: You may do so.

Mr. McDowell: I am instructed, your Honor, by the [fol. 1609] Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered.

The Court: You heard what Mr. McDowell said?

Mr. Correa: Yes, if your Honor please, I heard what Mr. McDowell has said. Now, the order in the form submitted to your Honor provides that the Government shall make production within thirty days from the entry of the order. I take it that that means, as a practical matter, that we shall have to wait till the expiration of that time to find out whether the Government adheres to the position which has been enunciated here this morning or not. If they do adhere to that position then, I take it, we shall have to take such further steps under the rules as we may be advised.

Mr. Royall: That is our position, also, your Honor.

Mr. McGovern: And Lever Brothers adheres to that position, also, your Honor, plus the fact, as I stated, that Mr. Fortas is out of the country and we have had no opportunity to consult about the position the Government has taken.

Mr. Busick: I take the same position, your Honor.

[fol. 1610] The Court: Now, the provisions of all the orders are substantially the same.

Mr. Correa: They are identical in form.

Mr. Royall: Yes.

The Court: Identical in form. All provide for thirty days.

Mr. Royall: Yes, sir.

Mr. Correa: Yes, your Honor.

The Court: I am not surprised that the Attorney General feels that way about it. I don't suppose your adversaries are, either.

Mr. McDowell: May I say, Your Honor, with respect to the thirty-day matter, we agreed to the inclusion of the provision for thirty days at the request of the defendants, but that it makes no difference to the position of the Gov-

ernment. I was instructed to state that the Government will respectfully decline to produce them.

The Court: Obviously, I welcome any test you wish to make of this decision, Mr. McDowell, you and the Attorney General.

You wish to file them today, gentlemen?

Mr. Correa: If your Honor please, sir.

The Court: Nothing further to be done now?

[fol. 1611] Mr. Royall: No, sir.

The Court: We will wait for thirty days, is that right?

Mr. Correa: Yes, if your Honor please.

The Court: At which time you shall take such action as you deem necessary under the circumstances.

Mr. Correa: That is correct, your Honor.

[fol. 1612] In United States District Court for the District of New Jersey

[Title omitted]

Newark, New Jersey,
August 21, 1956.

Before The Honorable Alfred E. Modarelli, U. S. D. J.

Transcript of Hearing on Plaintiff's Motion to Amend or Stay Order of July 24, 1956

Appearances:

Herman Scott, U. S. Attorney, District of New Jersey, By George J. Rossi, Assistant U. S. Attorney; Joseph E. McDowell, and Daniel M. Friedman, Attorneys, Department of Justice, Attorneys for the Plaintiff.

Toner, Crowley, Woelper & Vanderbilt, Attorneys for defendant Procter & Gamble Company, By John A. Ackerman; Dwight, Royall, Harris, Koegel & Caskey, Of Counsel, By Kenneth C. Royall, Frederick W. R. Pride, and H. Allen Lochner; Dinsmore, Shohl, Sawyer & Dinsmore, Of Counsel, By Richard W. Barrett.

O'Mara, Schumann, Davis & Lynch, Attorneys for defendant Colgate-Palmolive Peet Company; Cahill, Gordon,

[fol. 1613] Reindel & Ohl, Of Counsel; By Mathias F. Correa.

Bailey, Schenck & Bennett, Attorneys for defendant Lever Brothers Company, By Alexander T. Schenck; Arnold, Fortas & Porter, Of Counsel, By Abe Fortas.

McCarter, English & Studer, Attorneys for the Association; Davies, Richberg, Tydings, Beebe & Landa, of Counsel, By James T. Welch.

The Court: No. 10, United States of America vs. Procter & Gamble, and others, hearing on plaintiff's motion to amend or stay the order of July 24, 1956, heretofore entered by this Court. Are we ready on that?

Mr. McDowell: The plaintiff is ready, your Honor.

Mr. Correa: The defendants are ready, your Honor.

Mr. Royall: Ready.

Mr. Rossi: I respectfully move the admission of Mr. Daniel Friedman, attorney for Department of Justice, Antitrust Division. He is admitted to practice in New York State and before the United States Supreme Court.

The Court: I am very pleased to admit Mr. Friedman [fol. 1614] for the purpose of this motion.

Mr. Friedman: Thank you, your Honor.

The Court: Go ahead, Mr. McDowell.

Mr. McDowell: Your Honor, our motion this morning seeks to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes.

Because this matter does involve essentially this question of putting the matter in proper posture for appeal, I would like, with your Honor's indulgence, to ask Mr. Friedman, who is from the appellate section of the Department, to present the matter to the Court. I will, of course, be prepared to answer any questions your Honor may wish to address to me.

The Court: All right, Mr. Friedman, we will hear you from the appellate section.

Mr. Friedman: May it please your Honor, the order which your Honor entered in this matter on the 24th of July directed the United States to make available to the defendants within thirty days the grand jury transcripts. This order by its terms places the Attorney General in a very difficult dilemma, because he has a number of alterna-

tives and we think that each of these alternatives would involve a serious violation of an important public interest [fol. 1615] which the Attorney General thinks he should carry out. And we are therefore coming before your Honor to suggest that the order be amended in a way to eliminate these posibilities. And, alternatively, if your Honor does not see fit to amend the order we are asking for a stay of the order pending the taking of necessary appellate review in the Supreme Court.

The amendment which we are proposing to your Honor is that instead of the order directing us within thirty days to make the grand jury transcripts available that the order recite that in the event the United States does not make the grand jury transcripts available within thirty days the Court will then enter an order of dismissal.

The Attorney General has a great deal of respect for the orders of this Court and he feels that it is not in the public interest that in order to test the validity of your Honor's ruling with reference to the production of the grand jury transcripts he should be put in the position that he has to disobey an outstanding order of the Court in order to seek review of that order.

If, on the one hand, he is to comply with your Honor's order and make the transcripts available, from the appellate point of view that would moot the matter, because once [fol. 1616] the secrecy of the grand jury transcript has been breached the whole issue becomes moot. Moreover, it would require him to turn over the grand jury transcripts and thus dissipate and destroy the secrecy which he believes the public interest requires to be maintained.

On the other hand, if he does nothing and just remains until after the 30th day and does not comply, he is then put in the position that he stands before the bar of public opinion that he has disobeyed a valid and outstanding order of this Court which is within the Court's power to exercise.

We have already indicated that the Attorney General respectfully disagrees with your Honor's order and we think that he thinks that it is his obligation to test this order before the Supreme Court. But he does not think—and he very strongly is of this view—that the Executive Department of the Government in order to test the order of the Court should have to disobey it. We think that is

an unseemly position. And we want to make it very clear that in requesting this amendment of the order we are not in any way waiving any rights to challenge the substance of the ruling on appeal. We are merely trying to change the form of the order, to put it in terms that we can get effective appellate review of the order without being in [fol. 1617] the position of having to disobey the order as a condition to testing it.

We think there is no question but that this Court has the power to enter such an order. I don't seriously think it can be suggested that the Court could not amend the order in those terms.

Very briefly, in the event that your Honor declines to amend the order, we then suggest that the status quo should be preserved pending an appeal from the order, or, alternatively—we haven't frankly, decided which we are going to do, or both; it is a very difficult question—the filing of an application for an extraordinary writ. And we therefore ask if your Honor does not amend the order that he should stay the order until such time as we have had the application filed and the Supreme Court has disposed of it.

Now, I don't know, frankly, what objections, if any, our adversaries are going to make. And I respectfully suggest that we might hear from them and then we will be prepared to answer their objections.

The Court: Thank you, Mr. Friedman.

Mr. Friedman: Thank you, your Honor.

The Court: General Royall.

Mr. Royall: Your Honor, the defendant Procter & Gamble Company, The Procter & Gamble Company, which we desig- [fol. 1618] nate here as Procter, answers the argument made here today as follows:

As to the first request, primary request, in the plaintiff's motion, Procter says that the order herein dated July 23, 1956, is a proper and sufficient order at this stage of the proceedings.

However, without waiving this position Procter further states that the plaintiff's proposed relief of production or dismissal does not seem to be a relief which Procter could in any manner oppose.

This makes unnecessary a discussion of the alternate order proposed in the motion, which alternative, if it comes before the Court for consideration, Procter would oppose.

The Court: You understand, Mr. Friedman?

Mr. Friedman: Yes, I understand they are not objecting to the amended order.

Mr. Royall: We are not objecting to the relief, yes, your Honor.

The Court: Mr. Fortas.

Mr. Fortas: If your Honor please, our position is approximately the same, that is to say, we think the Government should have produced the documents. We don't believe that the Government is entitled to any special position in litigation. We understand that to be the rule of law in [fol. 1619] this country. And the Government has come in here and moved for a dismissal of the case in the event that the documents are not produced and we don't see how we can object to that on behalf of the Lever Brothers Company.

Mr. Correa: That, if your Honor please, states substantially the position of the Colgate-Palmolive Company, which likewise wishes to insist upon production of the papers required by your Honor's order, in the manner specified in your Honor's order. But equally, as stated by Mr. Fortas, we do not see how we can oppose the Government's motion, as we understand it.

Mr. Welch: Your Honor, on behalf of the Association, I would like to adopt the views expressed by counsel for the respondents.

The Court: Well, it looks like we are all in agreement. I certainly have no objection. You will submit an order in conformity with the opinions expressed by all counsel and I will sign it.

Mr. McDowell: Thank you, your Honor. I believe there is a draft of the order before the Court with our motion papers.

The Court: Have you gentlemen read the proposed order which Mr. McDowell has prepared?

Mr. Royall: Yes, sir; Procter did and I assume the [fol. 1620] others did.

Mr. Correa: We have.

Mr. Royall: My statement was made on the basis of the order attached to the plaintiff's motion.

The Court: All right, gentlemen, the order will be signed since there is no objection to it.

Mr. Correa: May we have a moment, if your Honor please?

The Court: Yes, sir.

(Counsel confer.)

Mr. Correa: There is nothing of substance, if your Honor please, except that—Is it proposed that the order in exactly this form be signed? I think technically it is an amended order, isn't it?

The Court: Yes, I imagine it is an amended order. You mean the title of it?

Mr. Correa: Yes, sir.

The Court: You have no objection to putting "Amended Order" there, have you?

Mr. Friedman: Certainly not, your Honor.

The Court: All right. My secretary isn't here so you will have to have someone in the United States Attorney's office type it, or Mr. McDowell write it in, or someone else.

Mr. Royall: Your Honor, I read a statement and we [fol. 1621] have it in the form of an answer which states our entire position. I would like to file it so it will be a matter of record and give a copy to the Government.

The Court: Does anybody else wish to file any?

Mr. Fortas: No, your Honor. On behalf of Lever, I would like to subscribe to the written statement filed by Procter.

Mr. Correa: And on behalf of Colgate I should like this record to stand as a record of our position on the Government's motion to amend its order.

Mr. Welch: That is also so for the Association.

The Court: That makes it unanimous.

Nothing further now and we will recess then to await the pleasure of the Naturalization Bureau when they are ready for the candidates for citizenship.

[fol. 1622] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

BRIEF IN SUPPORT OF MOTION BY DEFENDANT, THE PROCTER & GAMBLE COMPANY, FOR ORDER DIRECTING DISCLOSURE OF GRAND JURY TRANSCRIPTS—September 24, 1954

I. Names of Parties and Nature of Proceedings

This motion is for an order granting leave to The Procter & Gamble Company (hereinafter called "Procter") and its counsel to inspect and copy, commencing within ten (10) days after the entry of the order herein, the following documents or papers which are either in the possession or control of plaintiff and its counsel or are otherwise within the control of this Court:

The transcripts of the testimony of all witnesses taken before the Grand Jury of the United States District Court [fol. 1623] for the District of New Jersey sitting in Newark from May 1951 to November 1952 in connection with an investigation of possible antitrust law violations in the soap and synthetic detergent industry. (See proceeding numbered Cr. 174-51, 175-51, 176-51, 177-51.)

II. Statement of Facts

The facts are fully recited in the motion and affidavit of Kenneth C. Royall, dated September 24, 1954.

III. Question Involved

Whether Procter is entitled to inspect and copy the said transcripts of Grand Jury testimony.

IV. Argument

A. Procter is Entitled to Inspect and Copy the Grand Jury Transcripts in Accordance with the Discovery Procedures Prevailing in the Federal Courts.

Under the discovery provisions of the Federal Rules, Procter, on showing good cause, is entitled to inspect and copy designated documents and papers, not privileged, which are relevant to the subject matter of the pending

action or might lead to the discovery of admissible evidence.

The Grand Jury transcripts here sought to be examined are obviously relevant to the subject matter of this action or might lead to the discovery of admissible evidence. They reflect testimony taken in connection with an investigation of possible antitrust law violations in the soap in-
[fol. 1624] dustry. The documents subpoenaed in the same Grand Jury proceeding were ordered produced for the plaintiff's inspection under Rule 34 in this action. Thus, plaintiff itself has acknowledged the relevancy of information obtained in the Grand Jury investigation.

Furthermore, counsel for plaintiff, in his affidavit of March 21, 1953, filed in this cause in support of plaintiff's motion under Rule 34, dated March 6, 1953, admitted that he had been authorized to carry on and did carry on an investigation of the soap industry so that, *inter alia*, a determination could be made as to what action should be taken to enforce the antitrust laws "through criminal or civil proceedings or both." Therefore, at least one of the purposes of the Grand Jury investigation was investigation with a view to the possibility of this civil litigation. Indeed, at the hearings before this Court on March 25, 1953, the Court, in order to ascertain whether plaintiff used the Grand Jury proceeding solely to obtain information to proceed civilly, sought to elicit from plaintiff's counsel a statement as to whether he tried to get an indictment. Plaintiff's counsel failed to give this information despite the request made of him (Tr. p. 28-30). The relevancy of the information before the Grand Jury, therefore, seems plain.

[fol. 1625] Unless this motion is granted, Procter cannot obtain information bearing on the issues of this case. Good cause for granting the motion is evident. Such information is necessary to an adequate preparation and presentation of Procter's case and cannot be obtained in any manner other than by the granting of this motion. Plaintiff has for several years had the benefit of the transcript itself. It has also had the benefit of the use of the transcript in connection with and as a background to the documents which Procter and others were required to produce.

B. No Need for Secrecy Exists

Whatever may be said concerning the so-called secrecy of Grand Jury proceedings, one thing is clear. Under Rule 6 (a) of the Federal Rules of Criminal Procedure this Court has the power, "preliminarily to or in connection with a judicial proceeding" to direct an attorney or stenographer, as well as others, to "disclose matters occurring before the grand jury."

This and other Courts have recognized that the secrecy of Grand Jury proceedings will not be enforced once the reasons for secrecy have disappeared. *United States* v. *White*, D. N. J., 104 F. Supp. 120; *United States* v. *Byoir*, N. D. Tex., 58 F. Supp. 273, 275, *aff'd* 5 Cir., 147 F. 2d 336; [fol. 1626] *In re Grand Jury Proceedings*, E. D. Pa., 4 F. Supp. 283, 285; *Atwell* v. *United States*, 4 Cir., 162 Fed. 97, 101; *United States* v. *Alper*, 2 Cir., 156 F. 2d 222, 226.

Among the reasons most frequently stated for lifting the veil of secrecy is the fact that the Grand Jury has been discharged. In the instant case, the Grand Jury has been discharged for almost two years. Moreover, no indictments were returned against the defendants and no criminal action under the antitrust laws is pending against them.

As Judge Kirkpatrick said in *In re Grand Jury Proceedings*, *supra*, discharge is not the only circumstance which may move the court to disregard secrecy. Disclosure may be granted when it appears that "the ends of justice will be furthered" (p. 285).

Here, no need for protecting Grand Jurors from harrassment appears. The identity of most if not all of those who testified before the Grand Jury has been known for many months and it is believed that witnesses would have no objection to disclosure of their testimony. Moreover, Procter is not seeking to pry into the deliberations or votes of the Grand Jurors.

[fol. 1627] That the ends of justice will be furthered by granting disclosure is conclusively demonstrated, we submit, by the unconscionable advantages now possessed by plaintiff in its preparation (these will be further discussed in the next point), by Procter's need to be fully informed of the nature of the charges and evidence to be adduced, to be able intelligently to prepare for trial, by its need to

discover defensive material which does not appear from the documents which plaintiff may be required to supply, and by the need to have a transcript available for use at the trial in connection with testimony adduced by either party.

C. Parties are Entitled to Substantial Equality in Opportunity to Prepare for Trial.

Commencing with the issuance of the Grand Jury subpoenas in May 1951, plaintiff has proceeded uninterrupted in a one-sided discovery process. In the Grand Jury proceeding, plaintiff examined witnesses under oath without notice to Procter, without opportunity by Procter to procure protective orders, without opportunity to explain or clarify by cross-examination. It obtained documents from numerous companies without opportunity for Procter to obtain any limiting relief, except in the case of its own documents. Meanwhile, Procter could institute no dis- [fol. 1628] covery proceedings of its own. As appears on page 3, *supra*, it is clear that the Grand Jury proceedings were actually wholly or in part an investigation of and preparation for this civil case.

We are now in a civil case and have been for over a year and a half. Plaintiff's advantages acquired in the criminal proceeding have, over Procter's continuing protests, been confirmed by orders in the civil case permitting plaintiff to retain and make use of documents secured in the criminal proceeding.

Procter, by this motion, seeks a partial alleviation of the disadvantages confronting it. Though plaintiff's three and a half year handicap cannot be erased, Procter seeks to prevent to some extent the continuing inequalities. On principles of fair play, it seeks permission to see the same testimony which, presumably, plaintiff has employed in its preparation over the years.

Fair play is at the root of the Federal Rules of Civil Procedure which were designed to eliminate "surprise" and "technical advantage", to accomplish equality of preparation by affording the "widest possible opportunity for knowledge" by all parties of the facts, to stamp the federal judicial process with a "character of frankness and fair-

ness", and to promote the administration of justice by permitting decision on the merits rather than upon tech-
[fol. 1629] nicalities. 1 Barron and Holtzoff, *Federal Practice and Procedure* (1950), Foreword, p. V; Pike and Willis, *The New Federal Deposition-Discovery Procedure*, 38 Col. L. Rev. 1179, 1180, 1187, 1459 (1938); 1 *Moore's Federal Practice* (1938) 4-5; *Victory* v. *Manning*, 3 Cir. 128 F. 2d 415, 417; *Walsh* v. *Connecticut Mut. Life Ins. Co.*, E. D. N. Y., 26 F. Supp. 566, 573; *Mackerer* v. *New York Cent. R. Co.*, E. D. N. Y., 1 F. R. D. 408, 411.

Similarly, the due process clause of Amendment V to the Constitution incorporates as fundamental law the principles of fair play, including fair play in the conduct of judicial proceedings. These principles include a "reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U. S. 1, 18, 19; *Endicott Co.* v. *Encyclopedia Press*, 266 U. S. 285, 288; *Baker* v. *Hudspeth*, 10 Cir., 129 F. 2d 779, 781. The Government as a litigant is subject to the Federal Rules (1 *Moore's Federal Practice* [1938] 49) and "should be held to the same standards of fair dealing as we prescribe for other legal contests." *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 177.

As matters now stand, plaintiff can cull from a mass of information what it deems necessary for its case, while Procter cannot even inspect the material. Unless this motion is granted, Procter is deprived of a chance to ascer-
[fol. 1630] tain from the testimony, already seen and culled by plaintiff, any rebuttal or defensive matter or any suggestion for further preparation, discovery or investigation.

Plaintiff's advantages are substantial. Its ability to use information in the preparation of its case which is denied to Procter could seriously affect the outcome of the litigation. The trial, instead of being on the merits, could turn on surprise or on presentation of less than all the facts. At the very least, the trial could proceed without Procter having important information which plaintiff has obtained and utilized through the processes of this very Court. The Federal Rules and the due process clause, when applied to this case, require, we submit, the granting of the relief here prayed.

Conclusion

For the above reasons, this motion should be granted. September 24, 1954.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By (S.) John A. Ackerman, per Kenneth C. Royall, 810 South Broad Street, Newark, [fol. 1631] New Jersey. (S.) Richard W. Barrett, per Kenneth C. Royall, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio; (S.) Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1631a] [Stamp:] Filed Oct. 17, 1956, at 8:30 o'clock A. M., Michael Keller, Jr., Clerk.

[fol. 1632] In United States District Court for the District of New Jersey

Brief of the United States in Opposition to Motion by Defendant The Procter & Gamble Company for Order Directing Disclosure of Grand Jury Transcripts—Filed November 3, 1954.

Parties to and Nature of This Proceeding

One of the defendants in the above-styled action, The Procter & Gamble Company (hereinafter called "Procter"), has moved this Court for an order granting leave to it and its counsel to inspect and copy the transcripts of the testimony of all witnesses taken before a Grand Jury of the United States District Court for the District of New Jersey.

Procter's motion is made "pursuant to the discovery provisions of the Federal Rules of Civil Procedure and in accordance with the powers of this Court to act in the interest of justice with respect to litigation pending before it." Procter's Motion, dated September 24, 1954, p. 1.

Statement of Facts

Prior to the filing of this civil action by the United States charging Procter and others with violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2), a Federal Grand Jury sitting in Newark from May 1951 to November 1952 investigated possible violations of the antitrust laws in the soap and synthetic detergents industry.

[fol. 1633] This Grand Jury was discharged on November 25, 1952, without returning any indictments. On December 11, 1952, the United States filed this civil action. Several weeks later, on March 6, 1953, plaintiff moved for an order under Rule 34 of the Federal Rules of Civil Procedure requiring Procter to produce for inspection and copying a number of documents which it had previously submitted to the Grand Jury pursuant to subpoena. Procter vigorously opposed this motion, "above all else" on the ground that "the Government utilized criminal process for the purpose of investigation and discovery in a civil action and in order to evade the protective requirements of the rules and statutes governing discovery." Brief in Opposition to Plaintiff's Motion for Production by Defendant, The Procter & Gamble Company, of Documents Pursuant to Rule 34 of the Rules of Civil Procedure, dated March 17, 1953, p. 13; see also pp. 4-10, thereof, and the Affidavit of Kenneth C. Royall, attached thereto as Exhibit "A", pp. 22-24. Nevertheless, this Court granted plaintiff's motion by order dated May 27, 1953.

Immediately thereafter, on June 4, 1953, Procter moved this Court for an order forbidding plaintiff from using against Procter in this case, for any purpose prior to or during trial, any documents (including all copies, notes, evidence, etc. obtained from or made of them) submitted to the Grand Jury by Procter, by any of the defendants other than Procter or by any other person or firm. In support of this motion Procter again argued that the Government had used the Grand Jury proceedings and the criminal subpoenas to prepare for this civil action, thus depriving Procter of the protections granted by the Federal Rules of Civil Procedure with respect to discovery proceedings. Brief in Support of Motion By Defendant, The Procter & Gamble Company, To Suppress Certain Documents, dated June 4, 1953, p. 1; Affidavit of Kenneth C.

Royall, in support thereof, dated June 4, 1953, p. 2, par. (c). Procter's motion was denied by the Court in an order entered January 14, 1954.

[fol. 1634] Question Involved

Should Procter be permitted to inspect and copy the transcripts of testimony taken before the Grand Jury?

Argument

I. Grand Jury Transcripts Are Protected By The Solemn Rule Of Secrecy Surrounding The Grand Jury Process

Transcripts of testimony taken before Federal Grand Juries traditionally have been shielded from scrutiny. This policy of protecting the testimony given before a Grand Jury rests ultimately on the protection of the Grand Jury process itself. *Goodman* v. *United States*, 108 F. 2d 516, 519 (9th Cir., 1939); Cf. *United States* v. *Smythe et al.*, 104 F. Supp. 283 (N. D. Cal., 1952).

Accordingly, motions to examine grand Jury transcripts, absent a showing of extreme compulsion (i.e., fraud or other serious irregularity), have been uniformly denied. See, for example:

United States v. *Violon*, 173 Fed. 501 (S. D. N. Y.) 1909)

United States v. *Rubin et al.*, 214 Fed. 507 (D. Conn. 1914)

United States v. *Gould et al.*, 253 Fed. 242 (S. D. N. Y. 1918)

United States v. *Silverthorne et al.*, 265 Fed. 853 (W. D. N. Y. 1920)

United States v. *Garsson et al.*, 291 Fed. 646 (S. D. N. Y. 1923)

United States v. *Morse et al.*, 292 Fed. 273 (S. D. N. Y. 1922)

United States v. *Herzig et al.*, 26 F. 2d 487 (S. D. N. Y. 1928)

United States v. *Oleg*, 21 F. Supp. 281 (E. D. N. Y. 1937)

United States v. *Procter & Gamble Co. et al.*, 47 F. Supp. 677 (D. Mass. 1942);

Metzler v. *United States*, 64 F. 2d 208 (9th Cir. 1933)
United States v. *Cohen et al.*, 145 F. 2d 82 (2d Cir. 1945), cert. den. 323 U. S. 797
Shushan et al. v. *United States*, 117 F. 2d 110 (5th Cir. 1941)
[fol. 1635] *United States* v. *Crolich*, 101 F. Supp. 782 (S. D. Ala. 1952)
United States v. *Owen*, 11 F. R. D. 371 (W. D. Mo. 1951)
United States v. *Papaioanu*, 10 F. R. D. 517 (D. Del. 1950)
Cf. *Application of Bar Association of Erie County*, 182 Misc. 529, 47 N. Y. S. 2d 213, 218 (1944)
United States v. *General Motors Corp.*, 15 F. R. D. 486 (D. Del. 1954).

II. No Good Cause Exists Why This Court Should Permit Disclosure of the Grand Jury Transcripts

Notwithstanding the persistent and uniform application over the years of the rule of secrecy, counsel for Procter argue that in the circumstances of this case, the ends of justice will be furthered by the disclosure of the Grand Jury transcripts. They contend that examination of the transcripts will materially aid them in their preparation for trial; and that since plaintiff has had the advantage of having them available for use it is necessary in fairness and to comply with the spirit of the Federal Rules for these minutes now to be turned over to them. Procter's Brief, pp. 6-9.

In support of these contentions, counsel for Procter assert that plaintiff used the Grand Jury process to investigate and prepare this civil action. Procter's Motion, dated September 24, 1954, p. 2, par. (c); Procter's Brief, pp. 3, 7. This is the same assertion previously urged by counsel for Procter first, in an effort to block plaintiff's motion under Rule 34 for the production of certain documents submitted to the Grand Jury, and second, in an effort to suppress the use in this case of these and other documents and evidence. (Statement of Facts, pp. 2-3).

It is sufficient to note, with respect to this point, that this assertion has been rejected twice before in this case.

Opinion dated May 11, 1953, 14 F. R. D. 230, 233; Opinion dated January 14, 1954 (unreported).

[fol. 1636] As for the contention that "fairness" requires the disclosure to defendants of Grand Jury transcripts, the same argument has been vigorously advanced in other proceedings but never accepted by the Courts. During the pre-trial stages of *United States* v. *Henry S. Morgan et al.*, Civil Action No. 43-757, S. D. N. Y., filed Oct. 30, 1947, counsel for the movant declared, at a hearing on an identical motion, that the veil of secrecy surrounding Grand Jury proceedings "should be lifted in a discovery proceeding in a case of this immense scope where the plaintiff has the advantage of accumulating the material for many years." Transcripts of Hearing Before Judge Medina, December 8, 1948, *United States* v. *Henry S. Morgan et al.*, *supra*, p. 193, attached as Exhibit "A" to this Brief. As the colloquy on this point indicates, Judge Medina denied this motion from the bench.

The very motion and arguments here made by Procter were also considered by Chief Judge Leahy of the District of Delaware in *United States* v. *General Motors Corp.*, *supra*, p. 4. Prior to the institution of that case two Federal Grand Juries, one in 1951 and another in 1952 had investigated alleged violations of the Elkins Act. The first indicted a railroad, and the second returned a "no true bill" in favor of General Motors. Thereafter, the United States instituted a civil action against General Motors for alleged violation of the Act. In preparation for trial, General Motors moved for an order directing production of the transcripts of both Grand Juries for inspection and copying. The motion was denied. In his opinion Judge Leahy pointed out that discovery under the Federal Rules is not without limits; that "it must be halted when it attempts to invade ground reserved for loftier reasons than thoroughness of preparing one's case on the civil side of the court" (pp. 486-487). Because of the pertinency of that case to the issue now before this Court, the following extensive quote is appropriate:

> [fol. 1637] Protection of the grand jury process itself has been the basis for suspending the usual exercise of discovery rights of a litigant. Revelation of the jury minutes may, or may not, have an adverse

effect on the particular jurors and witnesses participating in the proceedings whose record is sought, but this alone is not the prime concern. The effect on subsequent proceedings, on jurors, on witnesses, on the privacy of the system itself, is of greater moment. The secrecy is maintained regardless as to what may arise in subsequent collateral litigation, even though long past the event of the Grand Jury's meetings. The very secrecy of the hearings is fundamental to our procedure, whether viewed in an historical perspective or under our current lights. Even in a criminal case, only extraordinary circumstances ever prompt a court to exercise a discretionary power to disclose.

I do not find in the present action for civil penalties any justification for ordering production for inspection and copying the transcripts of the Grand Jury's meetings. It is argued the Department of Justice will have the transcripts of the Grand Jury available and may use them, and such, it is suggested, will be a tactical advantage the discovery rules were designed to eliminate. But defendant here, has other discovery techniques at its disposal through which most of the information sought and clues to other possible sources may be obtained. The announced intent to use the transcript as an impeachment tool appears to me improper and demonstrates how disclosure could seriously impair the grand jury system, the freedom and effectiveness of its inquiry and deliberation. If a precedent is set that evidence before a grand jury may at some future time be disclosed to the probing examination of civil litigants in preparation of the trial of their cause not alone in a collateral matter but, as in the case at bar, in directly related matters where the inquisitorial examination of the grand jury and a civil litigant's discovery in preparation for trial encompass the same subject matter and include an identity of events, such precedent would tend to restrict the free function of the grand jury.

My beliefs coincide with those expressed by Judge Learned Hand in U. S. v. Garsson, D. C. 291 F. 646, 649: "It [i. e., the disclosure of the transcript] is said to lie in discretion, and perhaps it does, but no judge

of this court has granted it, and I hope none ever will." 15 F. R. D. 486, 487-488.

III. The Authorities Cited by Procter

Procter argues, nevertheless, that since the Grand Jury has been discharged, no indictments having been returned, [fol. 1638] there is now no reason to preserve the secrecy of the testimony given before that body. The five cases cited in support of this contention (Procter's Brief, pp. 4-5) are not, it is submitted, authority for the order Procter seeks.

United States v. *White*, 104 F. Supp. 120 (D. N. J. 1952) decided by this Court, is clearly an exception to the general rule, an exception which is not applicable here. There, the defendant had been indicted for perjury before a Grand Jury. This Court ordered that the defendant be permitted to inspect and copy her testimony before the Grand Jury on the ground that "an exception to the general rule arises in perjury actions which are based on the defendant's testimony before a Grand Jury." 104 F. Supp. at p. 122. In so holding, however, this Court cited and quoted with approval (p. 121) the "still accepted view" summed up in *United States* v. *National Wholesale Druggists' Ass'n.*, 61 F. Supp. 590 (D. N. J. 1945), as follows:

> While it is apparent that the Court has the power to grant a motion for inspection of the Grand Jury minutes, that power will be exercised only in cases of extreme compulsion. Where there is no allegation of an improperly constituted body, nor of fraud, misconduct or corruption and no positive allegation that there was no evidence of any sort before the Grand Jury, such power will not be exercised. 61 F. Supp. at page 593.

In *United States* v. *Byoir*, 58 F. Supp. 273 (N. D. Tex. 1945), aff'd. 147 F. 2d 336 (5th Cir. 1945), the District Court permitted disclosure of such of the proceedings before a Grand Jury as related to Byoir's alleged participation in a criminal conspiracy, in order that he might show no probable cause at removal proceedings in New York. This ruling was based primarily on the ground that Government counsel had already "breached the rule with reference

to the secrecy of the Grand Jury proceedings." (58 F. Supp. at p. 274) Moreover, the Court of Appeals modified this order so as to permit disclosure only if the removal court should seek the information contained in the Grand Jury minutes, and, it should be noted, the subpoena *duces tecum* was subsequently quashed by the removal court. Order of Judge Leibell, S. D. N. Y., February 17, 1945. [fol. 1639] In *In Re Grand Jury Proceedings*, 4 F. Supp. 283 (E. D. Pa. 1933); disclosure of the testimony of two witnesses before a Pennsylvania Federal Grand Jury was permitted to be made by a United States Attorney, acting in his official capacity and in the public interest, to a New Jersey tribunal. This case is similar to the recent decision in *In Re Bullock*, 103 F. Supp. 639 (D. D. C. 1952), not cited by Procter, where the public interest in disclosure, as opposed to the wishes of a private litigant, was determined to be paramount to the policy of secrecy. In the *Bullock* case, the District of Columbia Commissioners were permitted to examine the testimony of a D. C. police inspector before a Grand Jury which had investigated his dealings with a notorious gambler, on the ground that they had the duty and responsibility of supervising the police department. The Court refused, however, to permit them to examine the whole Jury transcript.

In *Atwell* v. *United States*, 162 Fed. 97 (4th Cir. 1908) no motion for disclosure of Grand Jury testimony was involved. There, the Court reversed the conviction of a Grand Juror who had revealed to defendant's counsel the substance of certain testimony before the Grand Jury. The Court said that the Juror's oath did not require perpetual secrecy in view of the fact that defendant's counsel could have obtained the names of witnesses and inquired into their testimony directly. Moreover, with respect to this holding, the Court in *United States* v. *American Medical Ass'n.*, 26 F. Supp. 429 (D. D. C. 1939), where a motion for examination of Grand Jury transcripts was at issue, said (p. 436):

> The departure taken by the Circuit Court of Appeals for the Fourth Circuit, some thirty years ago (Atwell v. United States, 162 F. 97, 17 L. R. A., N. S., 1049, 15 Ann. Cas. 253), in holding that secrecy is not required after indictment has been found, the accused arrested

and the Grand Jury discharged, seems to have made but slight impression upon the federal courts in disposing of many kindred questions arising since that time. I cannot accept the conclusions or reasons stated in the Atwell case. Considerations of public policy demand a lasting secrecy. Jurors are thereby inspired with assurance of security in discharging their im- [fol. 1640] portant duties and restrained from impeaching their findings. United States v. Rintelen, D. C., 235 F. 787. Witnesses are encouraged to truth and frankness. Metzler v. United States, 9 Cir. 64 F. 2d 203.

Lastly, Procter cites *United States v. Alper*, 156 F. 2d 222 (2d Cir. 1946). There a motion was made to have the transcript of the testimony of two witnesses before a Grand Jury examined by the trial judge to determine if there were inconsistencies between that testimony and their testimony at the trial. The trial judge's refusal to inspect the transcript was noted as one of many grounds of appeal. The Court of Appeals reversed the conviction on other grounds, and added some *dicta* relating to the circumstances under which a trial judge should examine the grand jury transcript.

Conclusion

The policy of insulating Grand Jury proceedings from disclosure is deeply rooted in the law, and has as its purpose the protection of the Grand Jury process itself. No case is cited by Procter, nor has any been discovered, where this rule of secrecy was lifted for the purpose and the reasons given by Procter. Moreover, in two recent cases directly in point, the very arguments now advanced by Procter were specifically rejected and the same motions were denied. For all of these reasons therefore, Procter's motion should be denied.

Dated: November —, 1954.

Respectfully submitted, (S.) Joseph E. McDowell, (S.) Robert Brown, Jr., (S.) Raymond M. Carlson, (S.) Daniel H. Margolis, Trial Attorneys.

Victor H. Kramer, Trial Attorney.

[fol. 1641] EXHIBIT A TO BRIEF.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William V. Connell, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to wit; Cover page of Stenographer's Minutes of Hearing before Judge Medina on Dec. 8, 1948 and also pages 190 and 193 inclusive and page 212 of said minutes in Case of U. S. A. vs. Henry S. Morgan, et al., Civil 43-757, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 7th day of October in the year of our Lord one thousand nine hundred and fifty-four and of the Independence of the United States the One Hundred and Seventy-ninth.

William V. Connell, Clerk. By John O. Livingston, Deputy Clerk

---

[fol. 1642] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 43-757

UNITED STATES OF AMERICA,

v.

HENRY S. MORGAN, et al.,

Hearing Before JUDGE MEDINA

(Pages 80 to 477)

(Printed Pages 59 to 327)

New York, December 7, 8, 9 and 10, 1948

[Stamp:] Filed December 31, 1948. U. S. District Court. S. D. of N. Y.

[fol. 1643] claim of Government immunity qua Government—and those words I quote from their brief: "Government immunity qua Government"—to the language of

Judge Moscowitz in the Welling case, where he says at page 4 of our brief or reply memorandum—

The Court: I have that.

Mr. Carson: Off the record I might read the words.

(Reads from decision.)

—275—

Mr. Carson: On the record again: We think the broader and more complete rule has been stated by Judge Rifkind again in this District in the Bank Line case on page 7 of this same memorandum. We have some discussion of it on page 7. On page 8 Judge Rifkind says, in substance, that when the Government has this extraordinary position of privilege it must select whether it will retain its immunity in the Civil courts, but when it comes to making the election, when that will is exercised in favor of litigating its claims, it is thereby exercised in favor of surrendering the conditional privilege of suppressing its housekeeping secrets when these are useful in the ascertainment of liability.

We think that is the rule which your Honor should apply here.

The Court: How about proceedings before the Grand Jury? Isn't there a certain secrecy there?

Mr. Carson: I want to revert to the Grand Jury minutes and I want to divide that into two categories.

I would say documents which are otherwise relevant and would be produced under your Honor's order are not given any immunity by being shown to the Grand Jury first; passing through its hands they do not pass through

[fol. 1644] —276—

an immunizing bath so as to protect them from our inspection otherwise available under Rule 34.

We would like to go further, and as a separate category of documents——

The Court: I agree with that statement; they do not gain immunity by being shown to the Grand Jury.

Mr. Carson: We have written a relevant letter, and they have it, and we have a copy, but they cannot by producing it before the Grand Jury cover it with privilege.

To go on with the Grand Jury, we would like separately to ask your Honor if you grant this relief to provide that we may have inspection of the Grand Jury minutes as a separate head of decision on my statement, which I think will be conceded to be the fact, that that Grand Jury is discharged. I think that makes a great difference.

These documents were called for before a grand jury, and were produced, as I understand, before a jury sitting in this District which, according to a letter—

The Court: Mr. Carson, I think you are wasting time on this part about getting me to direct that the Government give the defendants copies of the Grand Jury minutes. I have been thinking about that a good deal since I read these briefs, and I just am not going to be the first Judge

in this District to do that. I think it is a very unwise thing to do.

Mr. Carson: Now your Honor is giving me the benefit of the fact, which I think I am entitled to, that the Grand Jury is discharged?

The Court: I know.

Mr. Carson: There is a letter from the United States Attorney on file with the Clerk's Office saying it was discharged April 15, 1948. If it were still sitting, under such circumstances, where there is no question before a witness, [fol. 1645] we would probably not apply, but now it is closed and we have a civil litigation and it would seem to us the most relevant source, perhaps not the only source but the readiest source for information as to the matters referred to in the compilaint, both favorable to the defendants as well as unfavorable, would be the statements of witnesses before that jury.

I don't want to labor the point if your Honor says you have already passed—

The Court: No. I think my mind is set on it. It may be I have been unduly affected by that statement of Judge Learned Hand. It may be my experience over the years in these matters has so solidified my judgment that I am not open to argument on it, and I may be wrong, but I do believe that I am past the point where the argument

—278—

would persuade me.

Mr. Carson: I am not going to take your Honor's time beyond that except to call to your attention the statement of principle by Professor Wigmore which was called to your Honor's attention too, I think, and to Judge Hand's modification of his earlier statement when sitting in the Circuit Court of Appeals.

The Court: What is that modification?

Mr. Carson: Perhaps you and I disagree as to whether it is a modification.

The Court: Is this in this same memorandum?

Mr. Carson: That is in this same memorandum.

The Court: Of December 6th?

Mr. Carson: No. It is a memorandum we gave your Honor yesterday dated December 7th, our memorandum in support of defendants' request for Grand Jury minutes.

The Court: Oh yes, the typewritten one.

Mr. Carson: I don't know whether that contains the language of the Circuit Court of Appeals that we called your Honor's attention to. Yes; it is on page 4.

[fol. 1646] When Judge Hand was a member of that Court in United States v. Alpert he concurred in the expression of the majority opinion:

"The veil of secrecy surrounding the Grand Jury proceeding may safely be lifted where justice so re-

—279—

quires."

That simply supports our statement, which I take it your Honor would accept as the law, that it rests in your Honor's discretion whether it should be lifted in a discovery proceeding in a case of this immense scope where the plaintiff has the advantage of accumulating the material for many years.

The Court: I don't think that is any modification of Judge Learned Hand's views. You see this veil of secrecy being lifted is one thing, but giving the defendants in an antitrust suit the copy of the Grand Jury minutes is a little different. I think you are wasting time on that, Mr. Carson.

I do not like to have a closed mind but if I do have one I might as well say so rather than have you labor long on it.

Mr. Carson: Yes, thank you.

The Court: But I really am not open to persuasion.

Mr. Carson: Let me then suggest to your Honor, instead of my going further with that point, that I suspend it now on your Honor's statement without prejudice to any application which a deposition may justify.

The Court: That is right.

—280—

Mr. Carson: The Government also argues against this application on the ground of the work-product rule of Hickman v. Taylor. That is very clear. We don't want work product if we correctly understand the words; that is to say, we are not calling for summaries of statements [fol. 1647] The Court: I would not be disturbed just because it was new and different, but in addition to that it seems to me there is a fundamental difference between getting certain papers that you know you are going to get, and that you know something about, and designated in some affirmative way, and just looking through all the other fellow's papers, a few presumptively relevant, for you to

—307—

see if you can find something to help your defense.

Mr. Carson: That is a "fishing expedition" that is inherent in our training at the Bar, of course, but it seemed to us the new rules attempted to eliminate that and permit counsel on both sides to range through files which have any probability of relevance at all.

The Court: Let us see what the other side say.

Mr. Bennett: If your Honor please, may I first clear out of the air, if we can, two things which I think require no argument. The first one relates to the request that there be an examination of the minutes of the Grand Jury. I thought I understood your Honor to rule that you were not going to grant any such examination.

The Court: You understood correctly.

Mr. Bennett: Then I may leave that with this statement: that if your Honor should, by any chance, change his mind

we think it is an extremely important subject and we should brief it thoroughly.

The Court: I have decided that already with the reservation that Mr. Carson stated. He made the reservation, not a very comprehensive one, but I shall be willing to reconsider it if some occasion arises to do it, and I don't want to make a ruling that would preclude them from ever raising the question again. But I have decided it now and it would take considerable argument to get me to take a

—308—

different view later on.

Mr. Bennett: Very good, your Honor.

[fols. 1648-1703] Certificate of Service (omitted in printing)

[fol. 1704] In United States District Court

SXB:VHK 60-158-9

April 5, 1956.

Honorable Alfred E. Modarelli, United States District Judge, District of New Jersey, Newark 1, New Jersey.

Re: United States v. The Procter & Gamble Company, et al.

Civil Action No. 1196-52

My Dear Judge Modarelli:

In connection with the defendants' pending motions to compel disclosure of transcripts of testimony before the New Jersey federal grand jury which investigated the soap and synthetic detergents industry prior to the filing of this civil action, I respectfully call your attention to the recent ruling of Judge James M. Carter in *United States v. Standard Oil Company of California, et al.*, Civil No. 11584-C, S.D. Calif., C. Div., which I believe is precisely in point.

On March 30, 1956 Judge Carter granted the Government's motion and sustained its claim to privilege as to certain interrogatories of the defendants which sought to re-

quire the Government to make available federal grand jury transcripts. As you will recall, Judge Carter in Pre-Trial Memo. No. 1, dated July 6, 1955, had ordered the disclosure of the testimony of those grand jury witnesses who would consent to disclosure. On December 13, 1955, however, the Government moved the court for an order denying the defendants access to the transcripts of testimony of any grand jury witnesses. In support of this motion the Attorney General filed a formal claim of privilege asserting the privileged status of the transcripts of the grand jury testimony. The Attorney General based his claim of privilege on his determination that disclosure of the transcript of testimony of any witness before either of the two federal grand juries which had conducted investigations prior to the filing of that civil case would be prejudicial to the grand jury system and not in the public interest. Thereafter, at the hearing on January 16, 1956, this claim of privilege was withdrawn and a new claim was filed based on the same grounds urged by counsel for the Government in the motions now pending before you. A copy of this modified claim of privilege is enclosed.

[fol. 1705] With respect to the Government's motion in the *Standard Oil* Case, the minutes of the court, dated March 30, 1956, state:

> The Court having heretofore taken under submission the motion of plaintiff, filed December 13, 1955, for ruling sustaining the claim of privilege filed herein by the Attorney General on December 13, 1955, as modified by the claim filed January 16, 1956, in connection with certain interrogatories of defendants which sought to require plaintiff to make federal grand jury transcripts available, and the Court having duly considered this matter; now
>
> It is ordered that said motion of the plaintiff is granted and the claim of privilege is sustained.

A copy of this letter is being sent to counsel for each of the defendants in the *Soap* case.

Sincerely yours, Stanley N. Barnes, Assistant Attorney General, Antitrust Division.

Enclosure

[Fol. 1706] ATTACHMENT TO LETTER

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Civil Action No. 11584-C

UNITED STATES OF AMERICA, Plaintiff

v.

STANDARD OIL COMPANY OF CALIFORNIA; SHELL OIL COMPANY; The Texas Company; Richfield Oil Corporation; General Petroleum Corporation; Tide Water Associated Oil Company; Union Oil Company of California; and The Conservation Committee of California Oil Producers, Defendants.

CLAIM OF PRIVILEGE

Privilege is claimed for all transcripts of the testimony of all witnesses before the federal grand juries impaneled in the Southern District of California, Central Division, Los Angeles, California, in the years 1939 and 1947, which made inquiries concerning possible violations of the federal anti-trust laws by persons in the petroleum industry. This privilege I now assert to fulfill the Attorney's joint responsibility with the courts to protect the integrity of grand jury processes. The assertion of privilege is based on a careful consideration of the effects of the disclosure of transcripts of testimony of grand jury witnesses upon the public interest in the proper administration of justice.

My claim of privilege here is rooted in the established policies underlying non-disclosure of grand jury transcripts. One of the important reasons for the long standing public policy against disclosure of grand jury proceedings and [fol. 1707] testimony is "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes," *United States* v. *Rose*, 215 F. 2d 617, 628, and that "those who testify may feel free to speak the truth without reserve", *Goodman* v. *United States*, 108 F. 2d 516, 519, 522. This is essential to the effective administration of justice.

The suggestion that there can be no harm in disclosing the testimony of those witnesses who will consent overlooks the difficult position in which such witnesses may be placed.

Employees of the defendants and persons who do business with them, to whom the continued good will of the defendants is important, may feel compelled to agree to the disclosure of matters thought to have been given in strictest confidence, rather than to invite or risk the defendants' displeasure. The decision of the Court of Appeals for the Ninth Circuit in the *Goodman* case, *supra*, makes this clear beyond dispute.

The Department of Justice holds the transcripts of Grand Jury testimony as a trustee for the benefit of the people. The privilege against disclosure of such transcripts is that of the government, and not of the witnesses, and cannot be waived by consent of the witnesses. It is the obligation of the government to protect witnesses from any form of pressure or compulsion to disclose what was said in the privacy of the Grand Jury. Acquiescence in the proposed order would constitute notice to every future witness in a grand jury proceeding that he may be confronted with the choice of disclosing his testimony or risk offending an employer, or business associate, or other person whose continued good will is important to his economic welfare. Under such circumstances, there would be a strong incentive for the witness to refrain from giving testimony which would be detrimental to the interests of economically power-[fol. 1708] ful potential defendants. It would also tend to intimidate those who might otherwise give testimony against racketeers, mobsters and gangsters, thereby subverting the entire grand jury system.

For these reasons, the disclosure by the Department of Justice of the transcripts of testimony of witnesses before grand juries for use of defendants in this civil case would be prejudicial to the efficient and effective use of grand juries as instrumentalities for the detection and investigation of crimes, and would thus be prejudicial to our grand jury system and contrary to the public interest. Accordingly, by virtue of the authority vested in me, and for the reasons given, I assert the privileged status of said transcripts of testimony.

Respectfully, (S.) Herbert Brownell, Jr., Attorney General.

Dated: Jan. 13th, 1956.

[fol. 1709] IN UNITED STATES DISTRICT COURT

December 23, 1955.

Honorable Alfred E. Modarelli,
United States District Judge,
District of New Jersey,
Newark 1, New Jersey.

Re: United States v. The Procter & Gamble Company, et al.

Civil No. 1196-51

MY DEAR JUDGE MODARELLI:

The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing.

Sincerely yours, Joseph E. McDowell, Attorney, Department of Justice.

[fol. 1710] cc: Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York.

Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio.

Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York.

Arnold, Fortas and Porter, 1229 Nineteenth Street, N.W., Washington 6, D. C.

Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N.W., Washington 5, D. C.

[fol. 1711] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Newark 1, N. J.,
September 6, 1956.

Honorable Herman Scott, United States Attorney, Newark 1, New Jersey.

Honorable Joseph E. McDowell, Antitrust Division, Department of Justice, Washington, D. C.

Messrs. Arnold, Fortas & Porter, 1229 Nineteenth Street, N.W., Washington 6, D. C.

Messrs. Bailey, Schenck & Bennett, 744 Broad Street, Newark, New Jersey.

Messrs. Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York.

Messrs. O'Mara, Schumann, Davis & Lynch, 1 Exchange Place, Jersey City, New Jersey.

Messrs. Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N.W., Washington 5, D. C.

Messrs. McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey.

Messrs. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York.

Messrs. Dinsmore, Shohl, Sawyer & Dinsmore, Union Central Building, Cincinnati, Ohio.

Messrs. Toney, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey.

[fol. 1712] Re: United States v. The Procter & Gamble Co., et al.

Civil No. 1196-52

GENTLEMEN:

Reference is made to the amended order dated and filed in the above-entitled cause on August 21st last. The only purpose of this letter is to find out whether the plaintiff has produced as directed in the last paragraph of the amended order. Your early attention to this inquiry will be appreciated.

If the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order.

Very truly yours, Alfred E. Modarelli.

AEM:emo

[fol. 1712a] [File endorsement omitted]

[fol. 1713] IN UNITED STATES DISTRICT COURT

September 7, 1956

Honorable Alfred E. Modarelli, United States District Judge, District of New Jersey, Newark 1, New Jersey.

Re: United States v. The Procter & Gamble Co., et al.

Civil Action No. 1196-52

MY DEAR JUDGE MODARELLI:

I have Your Honor's letter addressed on September 6, 1956 to counsel in the above-entitled cause. In response to your inquiry I must respectfully state that plaintiff has not produced the grand jury transcripts for inspection by the defendants.

Sincerely yours, Victor R. Hansen, Assistant Attorney General, Antitrust Division.

[fol. 1714] cc of the attached to: Herman Scott, Esquire, United States Attorney, Newark 1, New Jersey—Attn: George J. Rossi, Esq.

Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York.

O'Mara, Schumann, Davis & Lynch, 1 Exchange Place, Jersey City, New Jersey.

Arnold, Fortas and Porter, 1229 Nineteenth Street, N.W., Washington 6, D. C.

Bailey & Schenck, 1180 Raymond Boulevard, Newark 2, New Jersey.

Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York.

Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio.

Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey.

Davies, Richberg, Tydings & Landa, 1000 Vermont Avenue, N. W., Washington 5, D. C.

McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey.

[fol. 1714a] [File endorsement omitted]

[fol. 1715] IN UNITED STATES DISTRICT COURT

Arnold, Fortas & Porter
1229 Nineteenth Street, N. W.
Washington 6, D.C.

September 7, 1956.

The Honorable Alfred E. Modarelli, United States District Court, Post Office Building, Newark 1, New Jersey.

Re: United States v. The Procter & Gamble Co., et al.

C.A. No. 1196-52

MY DEAR JUDGE MODARELLI:

I am in receipt of your letter of September 6, 1956. In response, I state that on August 24, 1956 I telephoned Mr. Daniel Friedman, one of counsel of record for the Department of Justice in this cause. I asked Mr. Friedman whether the Department of Justice would produce for the inspection of Lever Brothers Company the transcripts of the Grand Jury testimony pursuant to the order of the Court as amended on August 21, 1956. Mr. Friedman advised me that the Department of Justice would not produce the documents.

Accordingly, I respectfully suggest that the condition stated in the aforesaid amended order has not been fulfilled and that it is appropriate that an order of dismissal be entered pursuant to the plaintiff's motion and the Court's amended order of August 21.

A form of order is enclosed for your consideration.

Sincerely, Abe Fortas.

Encl:

cc: Joseph E. McDowell, Antitrust Div., Dept. of Justice, Washington, D.C.
Kenneth C. Royall, 100 Broadway, New York, N.Y.
Mathias F. Correa, 63 Wall St., New York, N.Y.
Adrien Busick, 1000 Vermont Ave., N.W., Washington 5, D.C.

[File endorsement omitted]

[fol. 1716] IN UNITED STATES DISTRICT COURT

Dwight, Royall, Harris, Koegel & Caskey
100 Broadway, New York 5, New York.

September 7, 1956.

Honorable Alfred E. Modarelli, United States District Judge, United States District Court, Post Office Building, Newark 1, New Jersey.

Re: United States v. The Procter & Gamble Company, et al.

Civil No. 1196-52

DEAR JUDGE MODARELLI:

Earlier this week and prior to your letter of September 6, we had prepared a motion for a judgment dismissing the action, which motion was to be filed today. The proposed motion referred to your order of July 23, 1956, to the plaintiff's motion of August 16, 1956, and our answer thereto, and to your order of August 21, 1956. The motion also alleged that the Grand Jury transcripts of testimony had not been delivered, and attached an affidavit, dated September 5, 1956, that Robert D. Larsen, one of our associates, requested production of such transcripts on August 24, 1956, and production was refused. The motion also tendered to Your Honor a judgment dismissing the action.

In view of Your Honor's letter, it seems unnecessary to file the motion today and sufficient to enclose Mr. Larsen's affidavit and to state that the transcripts of the Grand Jury testimony were not produced on or before August 24, 1956—or for that matter after that date. We are enclosing the proposed judgment which was for attachment to the motion, which we had prepared and we are hereby tendering such judgment for your signature.

Sincerely, Kenneth C. Royall.

c.c.: Clerk, United States District Court, District of N.J.
Herman Scott, Esq.
Joseph E. McDowell, Esq.
Mathias F. Correa, Esq.
Abe Fortas, Esq.
Adrien F. Busick, Esq.

[File endorsement omitted.]

[fol. 1717] IN UNITED STATES DISTRICT COURT.

Cahill, Gordon, Reindel & Ohl, Sixty-Three Wall Street, New York 5, N.Y.

September 7, 1956.

Re: U.S. v. The Procter & Gamble Company, et al.

Civ. Action No. 1196-52

DEAR JUDGE MODARELLI:

We have your letter of September 6th with reference to the amended order dated and filed in the above entitled cause on August 21, 1956 on motion of the plaintiff.

In response to the inquiry contained in your letter may I state that the plaintiff has not produced the transcripts of the Grand Jury testimony referred to in the last paragraph of the aforesaid order. Counsel for plaintiff confirmed to the undersigned on August 24, 1956 that plaintiff had not produced such material and did not propose to produce it.

Accordingly, it seems appropriate, as suggested in your letter, that an order dismissing the action pursuant to the provisions of the aforesaid order of August 21, 1956 should be entered. We enclose herewith a proposed form of order to that effect.

Respectfully, Mathias F. Correa.

Hon. Alfred E. Modarelli, United States District Judge, United States District Court, District of New Jersey, Newark 1, New Jersey.

[Enclosure]

Copy to all counsel.

[fol. 1717a] [File endorsement omitted]

[fol. 1718] IN UNITED STATES DISTRICT COURT

McCarter, English & Studer
Counsellors at Law
Newark, New Jersey.

September 7, 1956.

The Honorable Alfred E. Modarelli, Federal Building, Newark 1, New Jersey.

Re: United States of America vs. The Association of American Soap & Glycerine Producers, Inc.

Civil Action No. 1196-52

DEAR JUDGE MODARELLI:

Earlier this week, and prior to your letter of September 6th, we had prepared a motion for judgment dismissing the action, which was to be filed today. The proposed motion referred to your order of July 23, 1956, the plaintiff's motion of August 16, 1956, our answer thereto and your order of August 21, 1956. The motion also alleged that the Grand Jury transcript of testimony had not been delivered.

The motion also tendered to your Honor a form of judgment dismissing the action.

In view of your Honor's letter, it seems unnecessary to file the motion today and sufficient to state here that the transcript of the Grand Jury testimony was not produced on or before August 24, 1956—or, for that matter, after that date.

We are also enclosing the proposed judgment which was to be attached to our motion and which we have prepared and we are hereby tendering such judgment for your signature.

Respectfully yours, McCarter, English & Studer, By Augustus C. Studer, Jr. and Davies, Richberg, Tydings, Beebe & Landa, By James T. Welch, Attorneys for Defendant, The Association of American Soap & Glycerine Producers, Inc.

[fols. 1719a-1721] [File endorsement omitted]

[fol. 1722] In The United States District Court For The District of New Jersey

[Title omitted]

Brief In Support Of Plaintiff's Motion For Production By The Procter & Gamble Company Of Documents Pursuant To Rule 34 Of The Rules Of Civil Procedure.

a) Names of Parties and Nature of Proceedings

This is a Motion by the plaintiff, The United States of America, for an Order requiring The Proctor & Gamble Company, one of the defendants in the above-entitled action under the Sherman Act (15 U.S.C., Sec. 4), to produce certain designated documents for inspection, copying and photographing.

b) Statement of Facts

The documents to be produced are designated in Exhibit A attached to the Motion for Discovery and Production. The documents were produced by this defendant pursuant to subpoenas issued in the course of an investigation before the Grand Jury for the District of New Jersey in 1951 and 1952, and have been returned to said defendant. The documents are designated in Exhibit A by numbers given

them by The Procter & Gamble Company prior to their production before the Grand Jury.

As set forth in the Motion and in the Affidavit in support of the Motion, the designated documents constitute or [fols. 1723-1724] contain evidence relating to the subject matter involved in this pending action.

c) Statement of Questions of Law

Since this Motion is filed pursuant to and in conformity with Rule 34 of the Rules of Civil Procedure, the Plaintiff is aware of no questions of law raised.

d) Argument

The Motion and the supporting Affidavit show that the documents for which an Order is sought are specifically designated and constitute or contain evidence relating to matters which are relevant to the subject matter involved in the pending action.

The Motion thus meets the requirements of the Rules of Civil Procedure. *Rules 34 and 26(b) of the Rules of Civil Procedure for the District Courts of the United States.*

It is respectfully submitted that the Motion should be granted.

Walker Smith, J. Fergus Belanger, Norman J. Futor, Robert Brown Jr., Estella L. Baldwin, Trial Attorneys.

[fol. 1724a] Copy received this 6th day of March, 1953, 3:15 p.m.

Dwight, Royall, Harris, Koegel, Caskey, Paul (name illegible)

[File endorsement omitted.]

[fol. 1725] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRODUCTION BY DEFENDANT, THE PROCTER & GAMBLE COMPANY, OF DOCUMENTS PURSUANT TO RULE 34 OF THE RULES OF CIVIL PROCEDURE, AND AFFIDAVIT—March 17, 1953.

Toner, Crowley, Woelper & Vanderbilt, 810 Broad Street, Newark, New Jersey.

Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio.

Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1726] INDEX

	Page
Brief	372
I. Names of Parties and Nature of Proceedings	
II. Statement of Facts	372
III. Questions Involved	373
IV. Argument	373
A. Plaintiff's Motion Must be Denied Since Good Cause is Not Shown	373
B. The Process and Orders of This Court Have Been Abused and Disregarded	374
C. The Only Effective Remedy for the Abuse in this Case Is an Order Denying Plaintiff's Motion for Production and Inspection and Suppressing the Use of Any Information Obtained by Plaintiff in the Grand Jury Proceedings	379
Conclusion	381
Affidavit	382

[fol. 1727] TABLE OF AUTHORITIES CITED

Application of Bendix Aviation Corporation, S. D. N. Y., 58 F. Supp. 953	374, 378
Ballard v. *United States*, 329 U. S. 187	381
Charge to Grand Jury, C. C. Cal., 30 Fed. Cas. 992	375
Constitution of the United States, Fourth Amendment	374, 379, 380
Constitution of the United States, Fifth Amendment	382
Ex parte Jackson, D. Mont., 263 Fed. 110, *appeal dism'd on stipulation sub nom Andrews* v. *Jackson*, 9 Cir., 267 Fed. 1022	380
Federal Rules of Civil Procedure, Rule 34	373, 377
G. & B. Amusement Co. v. *Regent Theater Co.*, N.D. Ohio, 9 F. R. D. 721	373
Garrett v. *Faust*, E. D. Pa., 8 F. R. D. 556	373
Hefter v. *National Airlines, Inc.*, S. D. N. Y., 18 Fed. Rules Serv. 34.33, Case 1	373
Hickman v. *Taylor*, 3 Cir., 153 F. 2d 212, *aff'd* 329 U. S. 495	373

Page

In re Grand Jury Subpoena Duces Tecum of the Standard Sand & Gravel Company, N. D. W. Va. unreported, May 1, 1950) 374

In re Investigation of World Arrangements, Etc., Misc. No. 19-52, D. C. D. C. 376

In re National Window Glass Workers, N. D. Ohio, 287 Fed. 219 378

[fols. 1728-1729]

Leven v. *Birrell*, S. D. N. Y., 17 Fed. Rules Serv. 515 373

Malinski v. *New York*, 324 U. S. 401 380

McNab v. *United States*, 318 U. S. 332 380

McNair's Petition, 324 Pa. 48, 187 Atl. 498 378

4 *Moore's Federal Practice* (2d Ed., 1950) 2442-3, 2451 373

New York Times, January 13, 1953, pp. 1, 20 376

Nitschke, *Procedure in Antitrust Investigations*, Illinois Law Forum (Winter, 1950) 593, 603. 376

Rogers v. *United States*, 1 Cir., 97 F. 2d 691 380

Schenck v. *Ward*, D. Mass., 24 F. Supp. 776 380

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 380

United States v. *Kilpatrick*, W. D. N. C., 16 Fed. 765 375

United States v. *Philadelphia & R. Ry. Co.*, E. D. Pa., 221 Fed. 683 374

United States v. *Wallace Co.*, 336 U. S. 793 380

United States v. *Wong Quong Wong*, D. Vt., 94 Fed. 832 380

[fol. 1730] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRODUCTION BY DEFENDANT, THE PROCTER & GAMBLE COMPANY, OF DOCUMENTS PURSUANT TO RULE 34 OF THE RULES OF CIVIL PROCEDURE.

I

Names of Parties and Nature of Proceedings

On December 11, 1952, plaintiff filed its complaint in this civil action under the Sherman Act. Plaintiff has now filed a motion dated March 6, 1953, for an order requiring defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter"), to produce on or before March 30, 1953, the documents listed in its motion papers. As will hereinafter appear, Procter urges that plaintiff's motion be denied on the ground of failure to show good [fol. 1731] cause therefor and on the ground of abuse of the process of this Court.

II

Statement of Facts

The facts are fully recited in the affidavit of Kenneth C. Royall,* filed simultaneously with this brief and made a

*Printed hereinafter as Exhibit "A".
part hereof, and are discussed in the argument.

III

Questions Involved

1. Whether the instant motion should be denied because the plaintiff has failed to show good cause why the documents sought should be produced for inspection.

2. Whether the issuance of and action under the Grand Jury subpoenas and the plaintiff's purpose behind the issuance thereof constitute an abuse of process which requires the denial of plaintiff's motion in this civil action for production of documents originally obtained through the Grand Jury process.

IV

Argument

A. Plaintiff's Motion Must Be Denied Since Good Cause Is Not Shown.

Rule 34 of the Federal Rules of Civil Procedure requires an affirmative showing of good cause. A conclusory allega-[fol. 1732] tion is not sufficient. *Leven* v. *Birrell*, S.D. N. Y., 17 Fed. Rules Serv. 515 (1952); *Hickman* v. *Taylor*, 3 Cir., 153 F. 2d 212 (1945); aff'd 329 U. S. 495 (1947); 4 *Moore's Federal Practice* (2d Ed. 1950) 2442-3. Good cause cannot be shown when the moving party already is in possession of the information sought. *G. & P, Amusement Co.* v. *Regent Theater Co.*, N. D. Ohio, 9 F. R. D. 721 (1949); *Hefter* v. *National Airlines, Inc.*, S. D. N. Y., 18 Fed. Rules Serv. 34.33, Case 1; *Garrett* v. *Faust*, E. D. Pa., 8 F. R. D. 556 (1949); 4 *Moore's Federal Practice* (2d Ed. 1950) 2451. Furthermore, since plaintiff has had possession of the great bulk of Procter documents now asked for a year and a half and has made copies and notes, though improperly, of selected papers, it would seem obvious that plaintiff is already in possession of the information sought and has no cause for production under Rule 34.

In addition, plaintiff had these documents in its possession at the very time the plaintiff filed its motion to produce and delivered them to Procter five days thereafter pursuant to a previous demand.

B. The Process and Orders of This Court Have Been Abused And Disregarded.

This abuse took several forms. Even that part of the Grand Jury subpoenas which was sustained by the District Court was so broad, vague and indefinite as to be unreasonable, unduly burdensome and oppressive and thus to constitute an abuse of the process of this Court and an illegal search and seizure in violation of the Fourth Amendment, and should never have been sustained. While this position was fully presented before Judge Forman, we had no right of appeal from his interlocutory order. But we reserved [fol. 1733] our rights to contest the subpoenas later, and we now reassert our objections on the grounds set out in the brief filed before Judge Forman on June 1, 1951, which brief states our views and is hereby referred to and made a part of this brief.

After the Grand Jury subpoenas were partially sustained the process of this Court was abused and the instructions of Judge Forman were disregarded in several respects, including, among other things, the unconscionable delay in the return of Procter's documents, the making of copies of and notes concerning such documents, and the transporting of such copies and notes to Washington, D. C. See *Application of Bendix Aviation Corporation*, S. D. N. Y., 58 F. Supp. 953 (1945); *United States v. Philadelphia & R. Ry.* Co., E. D. Pa., 221 Fed. 683 (1915); *In re Grand Jury Subpoena Duces Tecum of the Standard Sand & Gravel Company*, N. D. W. Va. (unreported, May 1, 1950).

The matter we particularly urge upon this Court is that the Government abused the process of the Court by using criminal subpoenas before a Grand Jury in order to prepare for this civil action.

The retention of Procter's papers beyond any time reasonably necessary for the presentation of them to the Grand Jury and the failure to return papers from time to time, as was contemplated by Judge Forman and as would have been possible so far as the Grand Jury was concerned, shows that the primary purpose of the Grand Jury subpoenas and the investigation was to secure evidence and prepare for a civil case.

Moreover, the taking of copies and notes to Washington, D. C., was unnecessary for the purpose of presentation to

the Grand Jury and strongly suggests that a civil action was the real and ultimate purpose of the Grand Jury proceeding. [fol. 1734] Added to these circumstances are the others referred to in the affidavit in opposition to this motion, including the lapse of only a few days between the discharge of the Grand Jury and the filing of the civil complaint; the parallel between the arguments of Government counsel on the motions to quash and the allegations of the civil complaint; and then the exact identity of the documents produced under the Grand Jury subpoenas and those now sought for the civil action by this motion under Rule 34.

To top it all we have the statements of responsible Department of Justice representatives themselves that the filing of the present civil complaint results from a thorough investigation, "including extensive grand jury proceedings", and that no one in the Department was unhappy over the turn of events when the Grand Jury was discharged without returning an indictment. The only reasonable interpretation of their language is that the Government was using the Grand Jury investigation to prepare for the civil case.

This use of the subpoenas is, we submit, illegal, and the documents so obtained cannot be used in a civil action brought by the Government. Our position, so far as specific decisions are concerned, seems to be largely, if not entirely, a matter of first impression. Nevertheless, we believe it to be logical, morally right with respect to this defendant and others similarly situated, and a matter of great importance in the protection of fundamental rights. We are here attacking a method which has been employed by the Department of Justice for several years past, illegally in our opinion, and it is important with respect to the rights of all litigants that its legality be determined and that a decision be made as to the remedies which a defendant may employ to protect itself.

[fol. 1735] Historically, the Grand Jury has been deemed a bulwark of the liberties of the people, a protection against the oppressions of political power, and a shield against the over-zealous accusations of the prosecutor. *United States* v. *Kilpatrick*, W. D. N. C., 16 Fed. 765 (1883); *Charge to Grand Jury*, C. C. Cal., 30 Fed. Cas. 992, 993 (1872). Is its function now to be subverted so that it becomes an

instrument for the oppression of our individuals and corporations in behalf of the sovereign and in behalf of overzealous prosecutors?

It has become common knowledge in recent years that the Department, which has been denied the subpoena power by Congress, has circumvented its legal limitations by subverting the Grand Jury process for the purpose of preparing its civil cases. Persons who at one time or another were associated with the Department have said so. For example, Robert A. Nitschke, formerly with the Antitrust Division, writing on "Procedure in Antitrust Investigations", in Illinois Law Forum (Winter, 1950) 593, states, p. 605:

> "It [the Grand Jury] has been and is the chief investigating weapon in the Division's arsenal, used as such, and not just for the purpose of obtaining indictments. The Division has not hesitated, where the facts so indicated, to recommend the return of 'no true bills,' or to allow the grand jury term to lapse without action, or, where the proof does not develop a case appropriate for criminal action, to file eventually a civil suit."

How revealing of the inquisitor's mind is this statement. A recent and rather dramatic attempt to apply the device we condemn occurred in *In Re Investigation of World Arrangements, Etc.*, Misc. No. 19-52, D. C. D. C., on [fol. 1736] January 12, 1953, where the Government is reported to have offered to withdraw a criminal investigation in favor of civil litigation but on condition that the companies would agree to the production of documentary material which they were required to produce under an existing order based on Grand Jury subpoenas. Was this not a bland effort to "trade" out of the defendants the same unfair benefit by a threat of continuing the criminal proceedings and a bald admission of the purpose of the criminal investigation. Counsel for the companies are reported to have rejected the offer. New York Times, January 13, 1953, pp. 1, 20.

Those who are unburdened by the inquisitor's mantle and who have given mature thought to the misuse of the Grand Jury process have uniformly condemned the practice. Among those so condemning it are leaders of the Bar, and former Government counsel.

We are not speaking of mere matters of form when we attack the misuse of the Grand Jury process. Substantial rights are in jeopardy. If the Government in preparing for a civil antitrust case were compelled, like any other plaintiff, to abide by the civil rules, defendant would have notice of examinations, it would have the benefit of protective orders provided by the Federal Rules of Civil Procedure, it would have the right of cross-examination, and it would have the opportunity to take defensive measures of its own, both by way of examination and by discovery of documents. Finally, under the civil rules a defendant would be able to act as a party to a civil action instead of under the embarrassment and uneasiness which most people feel when under criminal investigation, even though those investigated are entirely innocent and the investigation is for ulterior civil purposes.

[fol. 1737] If the Government is to be permitted to misuse the criminal process, as it has done here, these fundamental protections disappear. Through the Grand Jury device, the Government commits witnesses to testimony which may be distorted or even incorrect because of the lack of any right of counsel to stop unfair and misleading questions or to conduct an explanatory cross-examination. Moreover, the Government secures and studies documents which the defendant is unable to examine, at least for many months. The Government in effect enjoys a two year handicap in the preparation of its case. When it files its complaint, it is substantially prepared for trial, whereas often the defendant scarcely knows what the case is about. Finally all this is done with the defendants and employees under the shadow which comes from a criminal investigation. Often, as in this case, this shadow is so unjustified that even after a one-sided and undefended presentation a Grand Jury fails to find even a prima facie case.

It is no answer for the Government to say that such an abuse of the criminal process is necessary since the Department has been denied the use of the subpoena power. In America the Department is still as subject to the law as any American individual or corporation. Furthermore, the Justice Department has no right to complain of the law. Without any improper use of a criminal subpoena, the Government in a civil case has far greater facilities for in-

vestigation in preparation of a civil complaint than does a private plaintiff. These include facilities of the Complaint Bureau and of the FBI as well as those of its large staff of attorneys, accountants and economists.

The existence in this case of an abuse of process appears clear from the authorities. *In Re National Window Glass Workers*, N. D. Ohio, 287 Fed. 219 (1922); *McNair's* [fol. 1738] *Petition*, 324 Pa. 48, 58-9, 187 Atl. 498, 503 (1936); *Application of Bendix Aviation Corporation*, S. D. N. Y., 58 F. Supp. 953 (1945). That the use of the Grand Jury process for any purpose other than the securing of an indictment is an abuse of that process is well illustrated in the *National Window Glass Workers* case, *supra*. There, a Grand Jury in the Southern District of New York returned an indictment for violation of the Sherman Act and the proceedings were ready to be set for trial. The Government thereupon instituted another Grand Jury investigation in the Southern District and subpoenas were served. Defendants moved to quash on the ground that the investigation was not in good faith but merely for the purpose of obtaining evidence in advance of trial of the indictments. When the Government admitted this to be true, the subpoenas were quashed. Thereafter subpoenas were issued requiring production of documents before a Grand Jury in the Northern District of Ohio in an investigation admittedly related to the same conspiracy charged in New York. The Government attorneys, however, now said that their purpose was to ask for a new indictment in the Ohio district although they still intended to try the New York indictment first and to try the Ohio indictment only if the New York prosecution failed for want of jurisdiction. Under these circumstances, the Ohio Federal Court found that the dominating object of the Ohio investigation was to examine witnesses and obtain documents for the New York case, that an abuse of its process existed, that it had power to correct the abuse, and that the subpoenas should be vacated conditionally. In so holding the court said (p. 225):

> [fol. 1739] "A supervisory duty not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice."

If it is an abuse of process to utilize a Grand Jury proceeding for the purpose of preparing for trial of another criminal case, *a fortiori*, it is an abuse of process to utilize a Grand Jury proceeding for the purpose of preparing for civil litigation. Accordingly, we submit that there has been an abuse of the process of this Court, that the abuse is so gross as to amount to a violation of the Fourth and Fifth Amendments, and that this Court has power to correct the abuse.

C. The Only Effective Remedy for the Abuse in This Case Is an Order Denying Plaintiff's Motion for Production and Inspection and Suppressing the Use of Any Information Obtained by Plaintiff in the Grand Jury Proceedings.

There being an injurious abuse of process as shown above, there must be a remedy. We do not believe that our Courts will see the rules flouted by one litigant, even the Government, at the expense of another litigant without some effective corrective action.

So far as we know, there are no civil cases clearly deciding the full point in question. Nevertheless, we believe that such authority as exists in the criminal field and to some extent in certain civil cases demonstrates logically and by analogy that the remedy we seek is appropriate.

It is not enough to admonish the Government for its abuse of process and to advise it to sin no more. It does not help the party that has been injured, and it does not deter the same injury to someone else in the future. In fact [fol. 1740] a mere reprimand encourages other abuses by graphically demonstrating that nothing is going to be done in the future to stop the abusive practices. Take the *Sand & Gravel* case, *supra*, where there was a disapproval of an abuse similar to one feature of the abuses in this case. That authority did not deter the Government from doing here a similar act to that condemned in the *Sand & Gravel* case. A more decisive remedy than a "slap on the wrist" is required, if unfairness is to be remedied and fundamental rights are to be protected in the future.

There is no way in which the Department of Justice can retrace its step and correct the injury already done in this case. The remedy must take the form of suppression of evidence or documents illegally obtained by abuse of proc-

ess. This has been the remedy often afforded in criminal cases, and it has been the remedy in some civil cases. *Rogers v. United States*, 1 Cir., 97 F. 2d 691 (1938); *Schenck v. Ward*, D. Mass., 24 F. Supp. 776, 778 (1938); *United States v. Wong Quong Wong*, D. Vt., 94 Fed. 382 (1899); *Ex parte Jackson*, D. Mont., 263 Fed. 110 (1920); *appeal dism'd on stipulation sub nom. Andrews v. Jackson*, 9 Cir., 267 Fed. 1022 (1920).

As Mr. Justice Frankfurter has said, "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U. S. 332, 347 (1943); see also *Malinski v. New York*, 324 U. S. 401, 414 (1945). The preservation of these procedural protections is in the province of the courts and ultimately in that of the Supreme Court. *McNabb v. United States*, *supra*.

In *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), Justice Holmes refused to permit the Govern- [fol. 1741] ment to benefit from the retention of copies of papers which were seized in violation of the Fourth Amendment. The same remedy should be employed here. It is immaterial whether the conduct shown in this case amounts to a violation of the Fourth Amendment, since evidence obtained by or during the course of wrongful acts by Government agents has been excluded even where it did not amount to a Constitutional violation. The exclusion has been, and should here be, on the theory that such a remedy was necessary to the maintenance of civilized standards of procedure by enforcement officers. *McNabb v. United States*, *supra*.

United States v. Wallace Co., 336 U. S. 793 (1949), supports the denial of plaintiff's motion in this case rather than otherwise. In the *Wallace* case, the documents in question had been produced pursuant to Grand Jury subpoena and the Grand Jury had indicted. The indictment was dismissed because women had been excluded from the panel, and the documents were ordered returned. In a subsequent civil case the district court declined to require the production of papers which had previously been produced before the Grand Jury. The Supreme Court reversed but did so on the ground that the exclusion of women from the panel bore only a remote relationship to an alleged wrongful search and seizure. The Court, however, speak-

ing through Mr. Justice Black, was careful to point out that no wrongful acts by Government agents were involved.

The implications of the *Wallace* case, therefore, tend to support the proposition that the documents might well be withheld from the Government where, as in this case, there has been a continuous pattern of abuse by representatives of the Government.

In a situation like ours, where procedural safeguards have been ignored, the important fact is not only the injury [fol. 1742] to the defendant but the injury to the administration of justice. As Mr. Justice Douglas has said in *Ballard* v. *United States*, 329 U. S. 187 (1946), where the Supreme Court in exercising its supervisory power, set aside a conviction before an improperly constituted jury panel, "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (p. 195).

Accordingly, this Court should redress the wrongs done to Procter by reason of the abuse described and, by dismissing this motion, should see to it that the Department of Justice in this case and in future cases will take no benefit at all from misusing the Grand Jury process.

Conclusion

In conclusion, the plaintiff's motion should be denied because (1) plaintiff did not show relevancy but stated mere conclusions without facts, and it does not need the information sought since it had possession of the papers when the motion was served and for the preceding eighteen months, (2) as to the documents now demanded by plaintiff the subpoenas were improperly sustained in the criminal proceeding, (3) the Court's orders and instructions were not complied with in many respects, including, among other things, the improper copying of Proeter's papers and the delay in returning them, (4) above all else, the Government utilized criminal process for the purpose of investigation and discovery in a civil action and in order to evade the protective requirements of the rules and statutes governing discovery. From every aspect, the Government's action abused the process of the Court and was unduly expensive [fol. 1743] to the Government and to the defendant, wa-

unjust, burdensome and oppressive to the defendant and violated its statutory and constitutional rights, including those derived from the Fourth and Fifth Amendments. As to this motion the only proper course and adequate remedy is to deny to the plaintiff the documents described in the motion.

We respectfully request that the plaintiff's motion for production and inspection under Rule 34 be denied.

Dated: March 17, 1953

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By Marshall Crowley, 810 Broad Street, Newark, New Jersey. Dinsmore, Shohl, Sawyer & Dinsmore, By Richard W. Barrett, 1218 Union Central Building, Cincinnati, Ohio. Dwight, Royall, Harris, Koegel & Caskey, By Kenneth C. Royall, 100 Broadway, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1744] EXHIBIT "A" TO BRIEF

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff.

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc., Defendants.

Affidavit of Kenneth C. Royall

STATE OF NEW YORK,
County of New York, ss:

KENNETH C. ROYALL, being duly sworn, deposes and says:

1. I am a member of the firm of Dwight, Royall, Harris, Koegel & Caskey, one of the attorneys for the defendant,

The Procter & Gamble Company (hereinafter sometimes called "Procter"), and am fully familiar with the proceedings heretofore had in the above entitled matter and with the circumstances recited herein relating to a certain Grand Jury investigation of various companies in the soap industry which preceded commencement of the above entitled case.

[fol. 1745] 2. This affidavit is made on behalf of Procter in opposition to plaintiff's motion dated March 6, 1953, for an order requiring Procter to produce for inspection on or before March 30, 1953, certain documents.

3. Plaintiff's motion is opposed on three principal grounds: (a) plaintiff has made no showing of good cause sufficient to entitle it to production of the documents listed in the motion papers, (b) plaintiff had heretofore utilized the Grand Jury proceeding in this District for the principal, if not the sole, purpose of obtaining for use in this civil action, the documents described in the motion papers and other evidence, as a consequence of which the process of this Court has been abused and plaintiff is not entitled to use such documents in this action, and (c) the subpoenas duces tecum served in the said Grand Jury proceeding were harassing and burdensome and plaintiff's actions in the Grand Jury proceeding did not comply with the rulings and instructions of the Court in the Grand Jury proceeding, as a consequence of which the process of this Court has been abused and the use of the documents sought is precluded.

A

Good Cause Has Not Been Shown

4. Plaintiff's motion and affidavit show no cause why this motion should be granted other than a conclusory allegation that the papers called for are relevant or material to the issues of this cause and are needed in preparation of its case.

[fol. 1746] 5. Plaintiff, in consequence of Procter's compliance with the aforesaid Grand Jury subpoenas duces tecum, has had possession, illegally as we contend, of the documents now sought, with relatively few exceptions, for approximately eighteen months and has improperly made copies of and taken notes on certain of said documents, presumably those which it considered relevant to this case.

6. At the time the present motion was served, Procter, contrary to the recital in said motion, did not have physical possession, custody or control of the documents sought, such documents then being in possession of the plaintiff and not being delivered to Procter until five days after service of the said motion.

B

An Abuse Of Process Has Been Committed In That Plaintiff Has Utilized The Grand Jury Proceeding For The Purpose Of Preparing For A Civil Action.

7. Without making any prior request of Procter for inspection of any of its documents, plaintiff in May, 1951 caused and procured the issuance of two Grand Jury subpoenas duces tecum returnable before the Grand Jury of this District sitting here in Newark, New Jersey.

8. On or about May 31, 1951, Procter and certain other companies which had been served with similar subpoenas moved for orders quashing and vacating the said subpoenas on the ground they were so sweeping and indefinite as to be unreasonable, oppressive and a violation of the Fourth Amendment of the Constitution of the United States.

[fol. 1747] 9. These motions were heard before Honorable Philip Forman. Upon the argument the subpoenas were substantially modified and limited by Judge Forman. The transcript and other papers relating to the Grand Jury proceeding are filed in the Clerk's office of this Court, Index No. Cr. 174-51, 175-51, 176-51, and 177-51.

(1) *Delay in Presenting Papers to Grand Jury.*

10. In response to a question of the Court on the hearings of the motions to quash as to whether Government counsel expected to go before the Grand Jury on June 12, 1951; Mr. Walker Smith, who represented the Government, expressed the hope that he would "have some of those easy-to-get documents in" (Tr. 67).

11. At the same hearings in June, 1951, Mr. Smith stated that he considered "time to be of the essence", that he hated "to have a Grand Jury come in and not have business". He also inquired whether the companies could produce some of the documents on or before July 10 and stated that if counsel would let him know in advance as to what

material they had "we will be able to plan our session for the 10th much better" (Tr. 69-70, 379).

12. With certain minor exceptions, Procter completed its production of the documents called for by the subpoenas, as modified by the Court, on or about September 21, 1951, which was within the time prescribed by the Court.

13. Despite Mr. Smith's statements indicating that he desired to proceed with dispatch and his insistance on prompt delivery of the documents covered by Judge [fol. 1748] Forman's order, yet I am informed and believe that there was a delay in presenting any substantial amount of Procter's documents or those of any of the defendants to the Grand Jury. Plaintiff knows the exact facts as to what documents were actually presented to the Grand Jury, and at what time, and if the plaintiff wishes to controvert this allegation, he should disclose the facts to this Court, with Procter's counsel having the right of cross examination.

(2) *Undue Retention of Papers.*

14. Each time Procter delivered papers pursuant to the said subpoenas, it addressed a letter to the Grand Jury stating that the documents were being delivered to the Grand Jury and requested that the receipt for such documents be signed "by the Grand Jury or its representative" and that the documents be promptly returned to the company after they had been seen by the Grand Jury. At the time of each delivery, a representative of the Attorney General signed the receipt "For the Grand Jury".

15. On various occasions after all or a part of Procter's papers were produced, I, as counsel for Procter, again demanded, both orally and in writing, that the papers be returned. Among such demands were those contained in letters to Mr. Smith, dated July 18, 1951, August 2, 1951, August 10, 1951, August 13, 1951 and August 22, 1951, and at various other times.

16. Nevertheless, with the exception of a very few documents, the Government did not return any of Procter's documents until March 10, 1953. Indeed, no offer was even made to return these documents until February 12, 1953, [fol. 1749] and such offer was made coupled with a proposal for a stipulation being entered into providing that the Gov-

ernment have the opportunity to make "such further copies and notes of documents produced pursuant to grand jury subpoena as we may desire".

17. The return of these papers was approximately twenty months after the first papers were produced by Procter for the Grand Jury, about eighteen months after the whole bulk delivery was completed and three and a half months after the Grand Jury had failed to return any indictment or presentment against Procter or others and had been discharged. The return also included certain documents produced pursuant to three additional subpoenas, served in June, 1952, as modified by order of this Court.

18. The complaint in this civil action was filed on December 11, 1952, three months before Procter's documents were returned to it.

(3) *Copies of Procter's Documents Were Made and Taken to Washington, D. C.*

19. Some months ago, I was informed by Mr. Smith that the latter had caused copies of and notes from certain of Procter's documents to be made and that such copies and notes had been taken to Washington, D. C. The making of such copies and notes was confirmed in a letter of February 12, 1953 from the Department in which is suggested a stipulation giving it the opportunity to make "such *further** copies and notes of documents produced pursuant to grand [fol. 1750] jury subpoena as we may desire". It seems to me reasonable to conclude that the making of these copies and notes and the taking of them from the site of the Grand Jury, all of which I consider improper, was with the purpose of preparing for this civil suit.

(4) *Alacrity With Which Civil Suit Was Brought.*

20. As I have said, the Grand Jury was discharged on November 25, 1952, and the civil suit was filed on December 11, 1952. Since the civil suit is of a complicated nature, it would appear to be a necessary inference that it was in the course of preparation during the period in which the Government had possession of Procter's documents, pursuant to the Grand Jury subpoena.

---

*Emphasis supplied.

(5) *Expressed Attitude of Government Counsel During and After Grand Jury Proceedings.*

21. During the course of the argument on the motions to quash the Grand Jury subpoenas, Mr. Smith, on behalf of the Government, presented contentions in support of various paragraphs of the subpoenas in which he described probable issues which would arise. Comparison of these statements and the allegations of the complaint in this civil action show the close similarity, thus tending to indicate that the Department of Justice had a civil action in contemplation at the time the Grand Jury proceeding was initiated.

22. In the Department of Justice Press Release of December 11, 1952, issued at the time the civil complaint was filed, the then Acting Assistant Attorney General in [fol. 1751] charge of the Anti-trust Division stated that "The filing of the complaint results from a careful and thorough investigation of this industry, including extensive grand jury proceedings".

23. Shortly after the Grand Jury was discharged without returning any indictment, Mr. Smith stated orally to me that he would not say or intimate what happened before the Grand Jury, but that no one in the Department was unhappy over the turn of events. The civil suit was filed immediately thereafter.

(6) *Similarity Between This Motion and Grand Jury Subpoena.*

24. This motion under Rule 34 calls for all of the documents produced under the Grand Jury subpoenas and also for some documents which were produced for inspection only of representatives of the Department of Justice, for example, the minute books. As to these, Judge Forman did not require actual production before the Grand Jury since he did not want the defendants to run the risk of losing custody of such irreplaceable papers (Tr. 295-8; 311-2). The fact that the motion calls for all documents produced or inspected also tends to indicate that a civil action was always in contemplation.

25. All these circumstances as well as others seem clearly to indicate that the object of the Grand Jury proceedings was to obtain information, documents and testimony for preparation of the civil action, and I so allege on information and belief.

[fol. 1752] (7) *Unreasonableness of Utilization of Grand Jury Proceedings for Preparation of Civil Case.*

26. In civil proceedings the Government, like any other plaintiff, must abide by the civil rules. Under these rules defendant would have notice of examinations. It would have the benefit of protective orders provided by the Federal Rules of Civil Procedure. Defendant would stay current with the plaintiff as its formal investigation proceeds. All documents and other evidence which plaintiff acquires would be immediately available to the defendant. The defendant would have the right of cross examination and the opportunity to take defensive measures of its own by way of examination and discovery.

27. By using the Grand Jury proceeding in preparation of a civil case, the Government secures the unfair advantage of having an ex parte proceeding. It commits witnesses to testimony before the Grand Jury without any benefit to the defendant by way of cross examination for the purpose of clarification or correction. It can compel production of documents at distant places without being subject to the protective orders obtainable in civil proceedings. It secures production of documents pursuant to Grand Jury subpoena without showing good cause, as is required by the civil rules. It secures and studies documents and obtains evidence which the defendant is unable to examine, at least for many months and which in this case the plaintiff even now insists on concealing while time runs on and pleadings are demanded by the plaintiff. The Government secures a time handicap, in this case two years, in the preparation of its case and when it files its civil complaint may be substantially prepared on matters of which the defendant has little [fol. 1753] or no knowledge. The civil rules provide specific safeguards against all those things which are deliberately sought and obtained by the plaintiff by what we allege to be gross abuse of process.

C

Since The Grand Jury Subpoenas Were Harassing and Burdensome and Plaintiff's Actions In The Grand Jury Proceedings Were Illegal An Abuse of Process Occurred In That Proceeding Precluding the Use of the Documents Sought In This Civil Action.

(1) *The Documents Were Illegally Obtained In The Grand Jury Proceeding.*

28. As appears from Procter's motion on file in the Grand Jury proceeding, Procter moved for an order quashing and vacating the subpoenas duces tecum on the grounds, *inter alia*, that (a) "the Court had no jurisdiction" to issue them and (b) they were "so broad, sweeping, vague and indefinite as to be unreasonable, unduly burdensome and oppressive, and thus constitutes an abuse of the process of this Court, an illegal search and seizure in violation of the Fourth Amendment to the Constitution of the United States".

29. Although this Court substantially modified and limited the said subpoenas it did not quash them in their entirety. Procter could not then appeal from this Court's order on said motions and it had no opportunity to appeal thereafter since no indictment was found. Nevertheless, Procter at all times preserved its right to challenge the illegality of said subpoenas. Therefore, in this civil case [fol. 1754] in which for the first time in a definite adversary action an effort is made to use the Grand Jury documents, Procter contends that these documents were illegally obtained and cannot in this proceedings be used or ordered produced.

(2) *Plaintiff's Conduct In The Grand Jury Proceding Was Illegal.*

30. The Court ruled on the hearings of the motions to quash that the documents submitted should be returned promptly and counsel for the Government agreed that they would be returned as quickly as possible. This is substantiated by the following colloquies:

(a) The Court stated that the documents were to be returned "as quickly as the situation permits" (Tr. 742). It stated that it did not want the Government to retain at

one time a greater accumulation of documents than could be "digested" or "assimilated" (Tr. 752). The Court stated that "there must be some time limit" to the retention of papers. Government counsel "ought to have a control over the accumulation of them—and one of the ways to prevent that would be to give back some of the papers as they come in". If the situation should become clogged, the Government was not to "take any more papers" for the time being (Tr. 756-7).

(b) Mr. Smith stated to the Court that he and his staff would run through the documents "just as fast as possible and return them, either subject to recall" or subject to taking photostatic copies. He did not "want to keep them around. We will get them right back as fast as possible" (Tr. 297). Mr. Smith stated that he had no desire to keep papers as such and would "make every effort to return documents just as quickly as we can do" (Tr. 745). He [fol. 1755] stated that there was "absolutely no question" of the companies "getting them back" and as fast as he found that a document had "no possible bearing" he would return the document "at once" (Tr. 748, 750). He promised that he and his associates would be "just as quick as we can and not retentive for the sake of being retentive" (Tr. 753). Thereafter, Mr. Smith said that the return of some of the papers might be possible within "two or three weeks" (Tr. 755).

31. Despite the foregoing rulings by the Court and assurances by Mr. Smith, Procter's documents, with the small exceptions previously noted, were not returned until March 10, 1953, more than eighteen months after the rulings and statements referred to in paragraphs 29 and 30 and over three months after the Grand Jury was discharged.

32. The Court ruled on the hearings of the motions to quash that the papers submitted, including those which were of a highly confidential nature (See, in general, Tr. 30, 36, 90, 134, 173, 212-4, 522, 544) and also including all other papers, should be retained in the rooms provided in the Federal Building in Newark, New Jersey, and counsel for the Government agreed. This is substantiated by the following colloquies:

(a) The Court contemplated that examination of the documents would occur in the Grand Jury room or rooms adjacent thereto, for it stated that it thought "that the

course of examination of them, either inside the Grand Jury room or in the anteroom, as has come to be the practice, would have to be followed in order for the processes to be accomplished at all" (Tr. 738).

[fol. 1756] (b) Mr. Smith stated to the Court that rooms had been made available to him "which are interior rooms which are kept absolutely locked at all times, and a very considerable quantity of the documents will be kept in a room which * * * for purposes of safety I am very pleased, has even no windows. It is an absolutely interior room, and I believe is a very safe room and will be kept completely locked, and the documents there will be kept in the filing cabinets * * * I believe that there is no means of safekeeping which we have forgotten, and they all, your Honor, will be continuously observed" (Tr. 751-2).

33. Nevertheless, as I have previously pointed out, counsel for the Government caused copies and notes of certain of the said documents to be made and taken to Washington, D. C. Such papers would normally have been seen or handled by persons not directly concerned with the Grand Jury proceedings. In my opinion, if plaintiff wishes to explain the facts in this and preceding paragraphs, it should do so by specific evidence subject to cross examination.

34. I submit that the above described conduct of Government counsel amounted to a violation of the letter and spirit of this Court's order and shows an abuse of the process of this Court.

34. I further submit that plaintiff has failed to show good cause why its motion should be granted, and that by reason of the facts stated herein, including the use of a [fol. 1757] criminal subpoena to investigate a prospective civil case, the plaintiff's motion should be denied.

Sworn to before me this 17th day of March, 1953.

Kenneth C. Royall.

Rose C. Guarraia, Notary Public. [Notarial Seal]

[Stamp:] Filed October 22, 1956 at 1:30 o'clock PM. Michael Keller, Jr., Clerk.

[fol. 1757a] Acknowledgment of Service (omitted in printing)

[fol. 1758] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRODUCTION BY DEFENDANT THE PROCTER & GAMBLE COMPANY OF DOCUMENTS PURSUANT TO RULE 34 OF THE RULES OF CIVIL PROCEDURE—March 23, 1953

Names of Parties and Nature of Proceedings

This is a Motion by the Plaintiff, The United States of America, for an Order requiring The Procter & Gamble Company, one of the defendants in the above-entitled action under the Sherman Act (15 U.S.C., Sec. 4), to produce certain designated documents for inspection, copying and photographing. The Procter & Gamble Company asks that the Motion be denied for reasons set forth in its brief in opposition filed March 18, 1953.

Supplemental Statement of Facts

Additional facts material to the issues raised in Defendant's Brief are set forth in an affidavit by Walker Smith dated March 21, 1953, which is attached hereto and made a part hereof.

ARGUMENT

a) Plaintiff has shown good cause for the issuance of the Order requiring production

[fol. 1759] The showing of good cause required by Rule 34 varies according to the facts of the particular case and considerations of practical convenience. There are no universally applicable horn-book rules. *Moore's Federal Practice*, on which the defendant relies, states (4 *Moore's Federal Practice* (2 Ed. 1950), pp. 2449-2450):

> "The party seeking inspection is required to show 'good cause therefor'. Considerations of 'practical convenience should play the *leading role* in determining what constitutes good cause. What is good cause depends on the particular facts of each case: as Judge Mize said in one decision [*Leach* v. *Greif Bros. Coop-*

erage Corp., D.C. S.D.Miss. 1942, 2 F.R.D. 444, 446], *'It is difficult to lay down a definition of good cause that would apply to every particular case. There is a wide latitude . . .'*" (Emphasis supplied)

In *Hickman* v. *Taylor*, 153 F. (2d) 212 (3 C.C.A. 1945), on which the defendant also relies, the Court of Appeals for this circuit said (note 4, p. 216): "As to what precisely is meant by good cause the cases do not indicate with any degree of certainty . . ." The Court went on to quote the language of Judge Mize, quoted by Moore above.

In the case before the Court, the documents called for are stated under oath to be "relevant or material to the issues of this cause and '. . . needed to aid the plaintiff in the preparation of its case, and particularly in support of the allegations contained in Paragraph 34 of the complaint". (Affidavit of March 5, 1953). They are identified by numbers placed upon them by the defendant when it produced them pursuant to the grand jury subpoenas. It then produced them only when ordered to do so by Judge Forman after an extended hearing on its motion to quash the subpoenas. At that hearing counsel for the government (plaintiff here) outlined various possible violations of the antitrust laws to be investigated and set forth the relevance of these documents to such possible violations and the government's need for them to determine the existence of such possible violations, all to Judge Forman's satisfaction.

[fol. 1760] The defendant states in its Brief and Affidavit in opposition to the present motion that those statements of possible violations and the allegations of the complaint in this case are "closely similar" (Defendant's Affidavit, p. 21, par. 21; Defendant's Brief, p. 5). Defendant cannot say that the documents which it was ordered to produce because of their relevance to the descriptions of violations made in the argument are not equally relevant to the allegations of the complaint. Neither can it say that documents which were needed to determine the existence of such possible violations are not now needed to establish the allegations in the complaint.

Under these circumstances, no practical convenience would be served by the Court's requiring the plaintiff to

repeat in affidavit form the detailed statements made at the hearing on the subpoenas duces tecum.

The cases which defendant cites in support of its hornbook statement, "A conclusory allegation is not sufficient" (Defendant's Brief, p. 3) fail to support the application of that statement to the facts of the instant case.

Defendant cites *Hickman* v. *Taylor*, 153 F.(2d) 212 (3 C.C.A. 1945), in which, as we have already shown, the Court of Appeals recognized that the requirements for an adequate showing of good cause vary from case to case. In that case the Court simply refused to require the production by a lawyer and his clients of written and oral statements which had been made to the lawyer by third party witnesses.

Defendant also cites *Leven* v. *Birrell*, 17 Fed. Rules Service 515 (S.D. N.Y. 1952). In that case movant had filed an affidavit indicating counts of the complaints to which it claimed designated documents were relevant. The Court required production of some of those documents and did not require the production of others. Among those it did require to be produced were certain documents of which it said, "... relevancy has been specifically established and a proper foundation has been laid under the [fol. 1761] requirement of a previous ruling by Judge Clancy. ..." In the instant case, as we have stated earlier, all the documents have been found relevant and a foundation laid by the ruling by Judge Forman concerning the possible violations which the defendant declares are closely similar to the allegations of the complaint.

The cases which defendant cites in support of its hornbook statement, "Good cause cannot be shown when the moving party already is in possession of the information sought" (Defendant's Brief, p. 3) similarly fail to support the application of that statement to the facts of the instant case.

Defendant cites *G & P Amusement Co.* v. *Regent Theater Co.*, 9 F.R.D. 721 (N.D. Ohio 1949). But in that case, though the Court states as dictum, "Good cause is not shown when the mover has the information sought or can obtain the documents or information therein through other methods than the rules of discovery," it held the movant

was entitled to have the documents produced because it could not obtain the documents in any other way.

Defendant cites *Heftar* v. *National Airlines, Inc.*, 18 Fed. Rules Service 34.33 Case 1 (S.D. N.Y. 1952). But in that case the Court's denial of production of certain records was based on the point that movant's reason for their production was to establish that they were "records kept in the regular course of business".

Defendant cites *Garrett* v. *Faust*, 8 F.R.D. 556 (E.D. Pa. 1949). But in that case the Court simply refused to require one private litigant to produce his income tax returns for copying by another in the absence of a special showing of necessity, or of undue prejudice, hardship or injustice to the movant by the denial.

Defendant finally cites 4 *Moore's Federal Practice* (2nd Edition 1950) 2451. But that passage simply quotes the dictum from the *G & P Amusement* case, quoted above, and suggests comparison in a footnote to cases which all [fol. 1762] turn on special circumstances not present in the case before this Court, including *Garrett* v. *Faust*, discussed above; *Hickman* v. *Taylor*, 329 U. S. 495 (1947), where the Court stated a special showing should be made to require the production of "work product of a lawyer"; *United States* v. *Five Cases*, 9 F.R.D. 81 (D. Conn. 1949), where the Court stated a special showing should be made to require production of a chemical analysis of a type not provided for in the Federal Food, Drug and Cosmetic Act under which the action was brought; and *Dallamco* v. *Great Lakes S.S. Co.*, 9 F.R.D. 77 (N.D. Ohio E.D. 1949), where movant was denied an order requiring production of hospital records which were "primarily under (his) control" and of statements of witnesses.

Defendant has cited no case holding that the fact that a party has, at one time, had access to documents excludes such party from the discovery procedure provided by Rule 34.

b) There has been no abuse of the process or orders of this Court

Defendant's claim that Judge Forman's order improperly sustained the subpoenas duces tecum for production to the grand jury (Defendant's Brief, p. 13) is both untimely and

presented in the wrong forum. If defendant believed Judge Forman's order to have been improper (Defendant's Brief, p. 13) or to have permitted an abuse of process and an illegal search and seizure (Defendant's Brief, p. 3), it should have sought a remedy at the time of the order.

Defendant's claim that the attorneys in the Department of Justice or the Government abused the process of the Court (Defendant's Brief, pp. 4-13) ignores the structure of the antitrust laws and the authority duly established to enforce them, as well as material facts in the proceedings relating to the documents to be produced under the Motion.

The Sherman Act (15 U.S.C., Sections 1-7), which is the act under which the present civil action was brought and the principal act mentioned in the authorizations of the Attorney General for conduct of grand jury proceedings, is primarily a criminal act since its basic sections (Sections 1, 2 and 3) define crimes. But it contains also an [fol. 1763] ancillary section (Section 4) investing the district courts of the United States with jurisdiction to prevent and restrain violations of the act.

Judge Carpenter set out a careful analysis of the statute in his opinion in *United States* v. *Swift, et al.*, 188 Fed. 92, 96 (N.D. Ill. E.D. 1911):

> " * * * The Sherman Act is primarily a criminal statute. Its title announces its purpose. Section 1, 2, and 3 declare certain things to be illegal, and prescribe punishment for their doing. The equitable remedy provided by section 4 does not authorize the Circuits Courts [District Courts] of the United States to enjoin restraints of trade, as such; it does not subject to the processes of a court of chancery, contracts, combinations in the form of trusts or otherwise, or conspiracies or monopolies, in restraint of trade, either definitely or indefinitely. On the contrary, it invests the Circuits Courts [District Courts] of the United States with jurisdiction to prevent and restrain 'violations of this act'; and it is a well-known fact that the courts of the United States have no jurisdiction, except such as is conferred upon them by Congress. *Here the jurisdiction of the equity courts is made dependent upon the criminal sections.* If sec-

tions 1, 2, and 3 were repealed by Congress, there would be nothing left of the law to which Sections 4 and 7 could apply. *It is impossible to give effect to the equity sections without reference being had to the criminal sections.* It authorizes the processes of the Chancery Court to be used only to prevent the carrying out of that which is declared in the prior sections to be criminal. It follows, therefore, that unless that which is sought to be enjoined is a violation of the act under one of the preceding sections, in other words, that, *unless that which is sought to be enjoined is a crime, it cannot be enjoined, because it is only that which is made a crime by the statute which is subject to equity jurisdiction.*" (Brackets and emphasis added).

There is no necessity in this case for a decision as to the propriety of investigation before a grand jury designed solely to prepare for a civil action under Section 4 of the Sherman Act, since the investigation was begun and carried on with both criminal enforcement and civil enforcement in mind. The purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them, or of any other Federal antitrust laws, and, second, determination as to what action should be taken to enforce those laws [fol. 1764] through criminal proceedings, civil proceedings or both. The investigation and all proceedings incident to it, including the grand jury proceeding, were begun and carried on pursuant to and within instructions to accomplish those purposes. (March 21st affidavit of Smith).

Because the Sherman Act's Section 4 by virtue of which civil actions may be brought, is an ancillary section, dependent, as Judge Carpenter stated in the passage we have quoted, upon the criminal sections, it is difficult to see how any investigation could ever be begun with the sole purpose of bringing a civil case.

Assuming for purposes of argument that grand jury proceedings might be undertaken with the sole purpose of preparing for a civil case under Section 4, such action would not constitute any abuse of process or be in any way improper. The dependency of Section 4 upon Sections

1, 2 and 3 requires a determination as to whether there have been criminal violations before a civil action can be brought under Section 4. The structure of the Sherman Act itself thus contemplates that there shall be investigation as to whether a crime has been committed before a civil action can be begun. There cannot therefore be any impropriety in the use by the Government in enforcing the Sherman Act of any of the proper methods of investigation as to whether a crime has been committed. The propriety of the use of a grand jury to obtain evidence for use in other types of civil suits brought by the Government under statutes other than the Sherman Act is not before this Court.

Defendant states that there is no judicial authority for its claim that the use of a grand jury in the course of the investigation which eventuated in a civil case is an abuse of process.

Defendant does cite *In re National Window Glass Workers*, 287 Fed. 219 (N.D. Ohio 1922), but that case simply refused to allow a grand jury in one jurisdiction to be used to supplement the work of a grand jury in another jurisdiction which had already determined the [fol. 1765] existence of a violation of the law.

Defendant cites also a state court case, *McNair's Petition*, 324 Pa. 48, 187 Atl. 498 (1936). But that case merely held that a Pennsylvania state grand jury cannot go into matters not concerned with violations of the law.

Defendant cites also *Application of Bendix Aviation Corporation*, 58 F. Supp. 953 (S.D. N.Y. 1945). But that case encouraged the use in a civil Sherman Act case in the District of New Jersey of evidence obtained before a grand jury for the Southern District of New York. After the New York grand jury had been dismissed without action, the Court refused to require that the Government return documents produced before the grand jury until the Government had had an opportunity to apply to the New Jersey court in the civil proceeding for an order covering those documents. Judge Meany of this court subsequently sanctioned the use of the documents in the civil case when he ordered that, if, after the documents had been returned to the defendants, they failed to produce them at trial, copies could be intro-

duced by the Government: (Civil case No. 2531, Order March 19, 1945).

In re Grand Jury Proceedings, 4 F. Supp. 283 (E.D. Pa. 1933), was a case in which the District Court for the Eastern District of Pennsylvania sanctioned the use in a civil proceeding in the District of New Jersey of testimony before a grand jury of that (Pennsylvania) court. The court refused to recognize a claim that the testimony was taken before the grand jury solely for use in the civil proceeding.

Defendant contends that the making of copies and notes concerning the documents and the transporting of such copies and notes to Washington, D. C. constituted an abuse of process.

The Attorney General is by law responsible for enforcement of the Sherman Act in either criminal or civil proceedings or both. (5 U.S.C.A. 291; Statement of Organization and Functions of the Department of Justice, 11 Fed. Reg. Vol. 177 at pp. 177A-102 through 177A-114; Re-[fol. 1766] organization Plan No. 2 of 1950, note following 5 U.S.C.A. 291). He is required directly by law as well as by the necessities of his office to be "at the seat of the government" (5 U.S.C.A. 291). He has by statute been given seven Assistant Attorneys General (5 U.S.C.A. 295). In the performance of his responsibilities to enforce the Sherman Act, he has designated one of the seven Assistant Attorneys General to supervise all matters relating to the antitrust laws (Attorney General's Order No. 3732 and Supplements).

Acceptance of defendant's contention that there was impropriety in the making of copies and notes and the taking of them to Washington, D. C. would require that the Attorney General and the Assistant Attorney General, Antitrust Division, either make repeated personal visits to every judicial district in which grand jury proceedings are being conducted, or fail to perform the duties and responsibilities in the enforcement of the Sherman Act imposed on them by law.

Defendant's contention that there was an unconscionable delay in the return of its documents ignores the facts of the matter. The documents which defendant produced pursuant to the subpoenas were, with few exceptions,

copies made by photostatic or other duplicating processes or tabulations prepared by it in lieu of production of original documents. During the time these documents were in the Government's hands defendant knew that any of the documents for which it had specific need would be made available to it on request. On three occasions documents for which it stated it had specific need were delivered to its representatives. (March 21 Affidavit of Smith). Defendant thus suffered no appreciable harm by the Government's retention of the documents. Though defendant had made several general requests for the return of the documents prior to the dismissal of the grand jury on November 25, 1952, it made no request of any sort for any of these documents during the period from November 25, 1952 until February 25, 1953. When, on February 25, 1953 defendant did request their return, counsel for the plaintiff offered [fol. 1767] to return them the next day but was informed by counsel for defendant that it would notify the Government when it desired to take delivery of the documents. Thereafter arrangements were made to deliver the documents to counsel for defendant on March 6, 1953 at Newark. On March 6, 1953 an attorney for the Department and an attorney for defendant at the latter's request began a detailed check of the documents as a part of their return. That process was carried on pursuant to the request of the attorney for defendant until March 10, 1953 at which time the return of the documents was completed. (March 21 Affidavit of Smith). There was no "unconscionable" delay; in fact there was no improper delay in the return of the documents.

The cases which defendant cites in support of its contentions as to the actions of attorneys for the Government concerning the documents fail to support its position.

In *Application of Bendix Aviation Corporation, supra,* as has been pointed out above, the court did not—because of delay in return of documents or any other action of the Government—deprive the Government of their use in a civil proceeding. Instead, the court refused to require their return until the Government had had an opportunity to procure orders concerning such documents from the court having jurisdiction of the civil proceeding.

In *United States* v. *Philadelphia & R. Ry Co.*, 221 F.

683 (E.D. Pa. 1915), which defendant also cites, an indictment was quashed because a member of the bar, appointed as a special assistant, took stenographic notes of testimony before the grand jury. There is no longer any possibility of a court so holding, because 18 U.S.C. 556 and 6(d) Fed. Rules Cr. P. provide for the making of a stenographic transcript.

Defendant also cites *In re Grand Jury Subpoena Duces Tecum of the Standard Sand & Gravel Co.*, N.D.W.Va. (unreported May 1, 1950). The Government had taken [fol. 1768] original grand jury records out of the jurisdiction of the court, but the judge stated that "no premeditated disregard" of the process of the court was intended, and held that this did not constitute an unreasonable seizure, and that it did not invalidate the use of the records in evidence before the grand jury or in the trial of any case.

c) There is neither factual justification nor legal precedent for immunization of the defendant against civil relief under the Sherman Act.

Since section b) of this brief has already demonstrated that there have been no abuses of process concerning the documents to be produced pursuant to this Motion, there is no need to discuss in detail the sanction of immunization sought by defendant.

All the cases which defendant cites as to this proposition (Defendant's Brief, pp. 11-12) involve illegal searches and seizures and failure to accord due process in the *obtaining* of documents. In *United States* v. *Wallace*, 336 U. S. 793, 799 (1949), the Supreme Court determined there had been no illegal search or seizure and no failure to accord due process, and refused to immunize the defendant against use of the documents in subsequent proceedings.

Conclusion

It is respectfully submitted that the Court should enter the Order prayed for in Motion.

March 23, 1953

(S.) Walker Smith, (S.) J. Fergus Belanger, (S.) Norman J. Futor, (S.) Robert Brown, Jr., (S.) Estella L. Baldwin, Trial Attorneys.

[fol. 1769] AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Walker Smith, being duly sworn, says:

(1) That he is now and has been at all times material herein an attorney in the Antitrust Division of the Department of Justice;

(2) That he was authorized and instructed by his superiors in the Department of Justice to carry on a complete investigation of those engaged in the production, processing, distribution, purchase and sale of soap, other detergents or materials used in their manufacture, so that a determination could be made as to whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them or of any other Federal antitrust laws, and as to what action should be taken in performance of the duties of the Attorney General and of the Department of Justice to enforce those laws through criminal or civil proceedings or both;

(3) That the investigation and all proceedings incident thereto, including the grand jury proceeding in the District of New Jersey in which subpoenas duces tecum addressed to the Procter & Gamble Company were issued, were carried on pursuant to and within those instructions;

(4) That the documents produced by the Procter & Gamble Company in response to subpoenas duces tecum as modified by orders of this Court, and which are the documents described in Exhibit A to the Motion for Discovery and Production of Documents under Rule 34 now before the Court, were, with few exceptions, copies made by photostatic or other duplicating processes or tabulations prepared by the Procter & Gamble Company in lieu of production of original documents;

(5) That prior to the production of said documents pursuant to said subpoenas and on many occasions thereafter, he informed the Procter & Gamble Company through its [fol. 1770] counsel and other representatives that any of said documents for which it had specific and immediate need would be made available to it upon request;

(6) That on three occasions during the time said documents were held pursuant to subpoenas duces tecum, counsel for Procter & Gamble informed counsel for the Government that the Procter & Gamble Company had immediate need for specific documents and on each such occasion said documents were delivered to representatives of the Procter & Gamble Company;

(7) That no request for the return of all or any of said documents was made to him between November 25, 1952, when the Grand Jury was dismissed, and February 25, 1953; that on February 12, 1953 he, on behalf of the Department, telephoned counsel for the Procter & Gamble Company concerning the return of the documents and suggesting procedures to minimize the burden of discovery procedures; that thereafter on February 25, 1953 at a conference between him and counsel for the Procter & Gamble Company he offered, pursuant to a request then made by counsel for the documents, to return them to next day and was informed by counsel that counsel would notify him when it desired to take delivery of the documents; that thereafter arrangements were made to deliver the documents to counsel at the Post Office Building in Newark on March 6, 1953; that on March 6, 1953 an attorney for the Department and an attorney for the Procter & Gamble Company at the latter's request, began a detailed check of the documents as a part of their return; that that process was carried on pursuant to the request of the attorney for the Procter & Gamble Company until March 10, 1953, at which time the return of the documents was completed.

Walker Smith, Trial Attorney, United States Department of Justice.

Subscribed and sworn to before me on this 21st day of March, 1953.

Margaret U. Smith, Notary Public. (Seal.)

My Commission expires June 14, 1954.

[fols. 1770a-1786] Copy of within received this 23rd day of March, 1953.

Dwight, Royall, Harris, Koegel and Caskey, per H.G.L.

Copy of within served on Cahill, Gordon, Zachry & Reindel on this 23rd day of March, 1953.

Norman J. Futor.

[File endorsement omitted.]

[fol. 1787] In the United States District Court for the District of New Jersey

[Title omitted]

Brief in Support of Motion by Defendant, The Procter & Gamble Company, to Suppress Certain Documents—June 4, 1953

I. Names of Parties and Nature of Proceedings

This brief is in support of a motion by Procter for an order forbidding the plaintiff to use against Procter in this case for any purpose prior to or during trial the documents and papers described in the motion.

II. Statement of Facts

The facts are fully recited in the affidavit of Kenneth C. Royall, dated June 4, 1953, and the affidavit of Kenneth C. Royall, dated March 17, 1953, filed in opposition to plaintiff's motion under Rule 34 and incorporated herein by reference and made a part hereof.

[fol. 1788] III. Question Involved

Whether this Court should prohibit plaintiff from using against Procter in this case for any purpose prior to or during the trial the documents and papers referred to in the motion.

IV. Argument

Use by Plaintiff Against Procter for Any Purpose in This Cause of the Documents and Papers Referred to in the Motion Should Be Suppressed

In Procter's brief dated March 17, 1953, filed in opposition to plaintiff's motion under Rule 34, which is hereby incorporated herein by reference and made a part hereof, the arguments establishing the abuses of process by plaintiff which occurred during and since the Grand Jury proceedings in 1951 and 1952 are fully set forth. As there appears, the subpoenas duces tecum, pursuant to which the documents were submitted, were, even as modified, illegal. Moreover, the instructions of Judge Forman were disregarded by plaintiff in several respects, including the unconscionable delay in the return of Procter's documents until over three months after discharge of the Grand Jury, the making of copies, notes, etc. of such documents and the [fol. 1789] transporting of such copies, notes, etc. to Washington, D. C., all of which was contrary to law and to Judge Forman's orders. Furthermore, the circumstances show that the Government abused the process of this Court by using the Grand Jury proceedings and the criminal subpoenas to prepare for this civil action, the effect of which was to deprive Procter of the protections granted by the civil rules with respect to discovery proceedings, including notice of examinations, the right to cross examination and the opportunity to take other defensive measures.

The authorities collected in Procter's brief dated March 17, 1953 strongly indicate, we submit, that an abuse of process has been committed.

The only effective remedy for such abuse is to prohibit use by plaintiff against Procter for any purpose in this case of any of the documents and papers referred to in the motion. As pointed out in the brief of March 17, 1953, remedy short of this would encourage rather than deter future abuse of the process of this Court.

We shall not reargue this point at length since our contentions have been fully presented in our brief dated March 17, 1953 and on the oral argument in opposition to plaintiff's motion under Rule 34.

We do again contend that the Fourth Amendment of [fol. 1790] the Constitution has clearly been violated. We also again contend that Procter is entitled to the relief sought herein, whether or not it should be decided that there is a violation of the Fourth Amendment. Evidence obtained by or during the course of wrongful conduct by Government agents may be excluded even where the wrongful conduct does not amount to a violation of the Constitution, the theory being that such a remedy is necessary to the maintenance of civilized standards of procedure. *McNabb* v. *United States*, 318 U. S. 332 (1943).

Conclusion

As appears in our prior brief and herein, the remedy of exclusion of the evidence obtained during the course of the Grand Jury proceedings is necessary in this case and is the only effective remedy which may be applied. Procter's motion should therefore be granted in all respects.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By Willard G. Woelper, 810 Broad [fols. 1791-1794] Street, Newark, New Jersey. Richard W. Barrett, per (illegible) Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Defendant, The Procter & Gamble Company.

Dated: June 4, 1953.

[fols. 1794a-1795] Acknowledgment of Service (omitted in printing)

[Stamp:] Filed October 22, 1956, at 1:30 oclock p.m., Michael Keller, Jr., Clerk.

[fol. 1796] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

BRIEF IN SUPPORT OF MOTION BY DEFENDANT, THE PROCTER & GAMBLE COMPANY, FOR RETURN OF COPIES AND OTHER WRITINGS.—June 4, 1953

I. Names of Parties and Nature of Proceedings

This motion is for an order requiring plaintiff and its counsel to return to the defendant, The Procter & Gamble Company (hereinafter sometimes called "Procter"), all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning certain documents which were delivered to a Grand Jury of this Court in 1951 and 1952. These same documents—but not the copies, etc. —are the subject of the Rule 34 order entered by this Court against Procter on May 27, 1953, requiring photostatic [fol. 1797] copies to be delivered by Procter to the plaintiff as designated by plaintiff.

II. Statement of Facts

The facts are fully recited in the affidavit of Kenneth C. Royall, dated June 4, 1953, and the affidavit of Kenneth C. Royall, dated March 17, 1953, submitted in opposition to plaintiff's motion under Rule 34.

III. Question Involved

Whether Procter is entitled to the return by plaintiff and its counsel of all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning the documents which are the subject of the order entered by this Court on May 27, 1953.

IV. Argument

Procter Is Entitled to the Return of All Copies, Notes, Excerpts, Analyses, Summaries and Other Writings.

The documents were previously submitted to the Grand Jury under an order of Judge Forman of this Court, acquiesced in by counsel for the Government, requiring the

documents to be kept in certain rooms in the Federal Building in Newark, New Jersey. In violation of this ruling, counsel for the Government made copies and notes of cer- [fol. 1798] tain of said documents and transported them to Washington, D. C. where they would normally have been handled and seen by persons not directly concerned with the Grand Jury proceedings. This was illegal and improper and constituted an abuse of process, and Procter is entitled to the return of such copies and notes and of any excerpts, analyses, summaries and other writings relating to such documents.

As Justice Holmes pointed out in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), evidence or knowledge "gained by the Government's own wrong" is not merely forbidden to be "used before the Court but * * * it shall not be used at all."

Procter is also entitled to the return of the copies, notes, excerpts, analyses, summaries and other writings, because the Grand Jury proceedings in connection with which the originals thereof were obtained has long since terminated without any indictments against Procter or any of the companies which became defendants in this case. *United States* v. *Wallace Co.*, 336 U. S. 793, 801 (1949); *Application of Bendix Aviation Corporation*, S.D. N.Y., 58 F. Supp. 953 (1945).

As Mr. Justice Black said in the *Wallace* case, with respect to an order of the district court which required the [fol. 1799] return of photostatic copies, "Return of the photostats, like return of the originals, necessarily follows from the dismissal of the indictment" (p. 801).

In addition to Procter's legal right to have the copies, notes, excerpts, analyses, summaries and other writings and plaintiff's legal duty to return them, there are at least three practical reasons justifying their return:

(a) There is no reason why plaintiff should retain these writings when this Court has ordered Procter to furnish to plaintiff copies of such of the original documents as plaintiff designates,

(b) As set forth in the affidavit submitted herewith, the return of the writings would simplify compliance with this Court's order of May 27, 1953, by eliminating the neces-

sity of photostating many of the documents and by alleviating the time and trouble which would be required, and

(c) As is also set forth in the affidavit, an order for return of these writings would enable Procter to determine which of the documents plaintiff has considered sufficiently pertinent or relevant to copy, note, summarize or analyze. Despite the lapse of six months since the beginning of the action and over two years since the Grand Jury was impaneled plaintiff has not yet given Procter any information as to what documents it considers relevant or intends to rely [fols. 1800-1803] upon. Granting of this motion would be the first step in the essential process of limiting the documentary aspects of the case.

Conclusion

Procter's motion should be granted in all respects.

Dated: June 4, 1953.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By Willard G. Woelper, 810 Broad Street, Newark, New Jersey, Richard W. Barrett, per (illegible) Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio, Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Defendant, The Procter & Gamble Company.

[1803a] Acknowledgement of Service (omitted in printing)

[File endorsement omitted].

[fol. 1804] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION BY DEFENDANT THE PROCTER & GAMBLE COMPANY TO SUPPRESS CERTAIN DOCUMENTS—June 15, 1953.

Names of Parties and Nature of Proceedings

This is a motion by defendant The Procter & Gamble Company for an order forbidding the plaintiff to use against said defendant for any purpose prior to or during trial:

(1) documents and papers, submitted by Procter to the Grand Jury and covered by plaintiff's Motion under Rule 34 granted by the Court May 27, 1953, or submitted by anyone else (including defendants other than Procter) to the Grand Jury or to plaintiff pursuant to subpoena duces tecum;
(2) all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning any of the documents referred to in (1) above; and
(3) all papers, documents and other like evidence obtained, directly or indirectly, by reason of information or knowledge derived wholly or partially from the papers mentioned in (1) and (2) above.

The plaintiff, the United States of America, opposes the motion.

[fol. 1805] Statement of Facts

The material facts were set forth in the affidavits in support of and in opposition to, the plaintiff's Motion for Production of Documents under Rule 34, heard by the Court on March 25, 1953, decided by Opinion filed May 11, 1953, and granted by the Court's order of May 27, 1953. Those affidavits were the affidavits for plaintiff by Walker Smith, dated March 27, 1953 and March 5, 1953 (which are hereby incorporated herein and made a part hereof) and for this defendant by Kenneth C. Royall, dated March 17, 1953. This defendant's affidavit by Kenneth C. Royall dated June

4, 1953, submitted in support of this Motion to Suppress, incorporates by reference the last of these affidavits. It states also, indirectly, that the plaintiff's Motion for Production of Documents under Rule 34 was granted, a fact well known to this Court which granted the Motion.

Question Involved

Whether this Court should prohibit plaintiff from using against defendant Procter in this case for any purpose prior to or during trial the documents and papers referred to in said Motion (and described in the Nature of Proceedings in this brief).

Argument

This motion is based on contentions which were advanced by this defendant in opposition to the plaintiff's Motion for Production under Rule 34 and were considered and rejected by the Court in connection with that Motion.

This defendant sought by opposing the Rule 34 Motion to prevent the Government from obtaining copies of documents, originally obtained from it by grand jury process, for use in preparing for and trying this case. It now seeks to prohibit the plaintiff from using those documents, and all documents obtained from others through grand jury process, in the preparation and trial of the case. The contentions by which the defendant supports the motion thus [fols. 1806-1808] are not only identical to those it raised in the Rule 34 proceeding, but are raised in an identical manner and for the same purpose.

Defendant's Brief in Support of this motion simply incorporates its brief in opposition to the Rule 34 motion and describes and refers to its arguments therein.

The plaintiff's Brief in support if its Rule 34 motion, dated March 23, 1953, set forth in detail the plaintiff's views as to the applicable law and facts. We hereby incorporate that Brief herein and make it a part of this proceeding.

Plaintiff's Brief in Opposition to Defendant's "Motion for Return of Copies and Other Writings", filed today, deals with defendant's same contentions raised with a slightly different purpose.

Since both those Briefs are in the Court's hands, we shall not burden the Court with reargument here.

Conclusion

Since this Motion raises the same contentions in the same manner and for the same purpose as the contentions raised in opposition to plaintiff's Rule 34 Motion, and since this Court rejected those contentions in granting plaintiff's Rule 34 Motion, it is respectfully submitted that this motion of this defendant should be denied.

Dated: June 15, 1953.

(S.) Walker Smith, (S.) J. Fergus Belanger, (S.) Norman J. Futor, (S.) Robert Brown, Jr., (S.) Estella L. Baldwin, Trial Attorneys, United States Department of Justice.

[fol. 1808a] [File endorsement omitted]

[fol. 1809] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT THE PROCTER & GAMBLE COMPANY'S "MOTION FOR RETURN OF COPIES AND OTHER WRITINGS"—June 15, 1953

Names of Parties and Nature of Proceedings

This motion by defendant The Procter & Gamble Company seeks, as stated in the motion itself, "an order requiring plaintiff and its counsel to deliver to Procter all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning the documents which are the subject of the order of this Court on plaintiff's motion under Rule 34, entered on May 27, 1953." Though defendant entitles it, "Motion for Return . . ." it is not a motion for *return* since the copies, excerpts, notes, analyses, summaries and other writings which it seeks to have delivered by plaintiff to the defendant have never been in the possession of the defendant. The plaintiff, the United States of America, opposes the motion.

Statement of Facts

With one exception hereinafter mentioned, the material facts were set forth in the affidavits in support of, and in opposition to, the plaintiff's Motion for Production of Documents under Rule 34 heard by the Court on March 25, [fol. 1810] 1953, decided by opinion filed May 11, 1953, and granted by the Court's order of May 27, 1953. Those affidavits were the affidavits for plaintiff by Walker Smith dated March 21, 1953 and March 5, 1953 (which are hereby incorporated herein and made a part hereof), and for this defendant by Kenneth C. Royall dated March 17, 1953. This defendant's affidavit by Kenneth C. Royall of June 4, 1953 submitted in support of its present motion incorporates by reference the last of these affidavits and states also the additional fact (referred to as an exception above) that the motion under Rule 34 was granted by the Court's order of May 27, 1953.

Question Involved

Whether the defendant Procter is entitled to an order requiring plaintiff and its counsel to deliver to Procter all copies of, all excerpts from, and all notes, analyses, summaries and other writings concerning the documents which are the subject of the order entered by this Court on May 27, 1953.

Argument

This motion is based on contentions which were advanced by this defendant in opposition to the plaintiff's Motion for Production under Rule 34 and were considered and rejected by the Court in connection with that motion.

It is an effort to pursue further the theory that it is improper for the plaintiff, the Government, to utilize in this Sherman Act Section 4 Civil Action, materials and knowledge gained in the grand jury proceedings which were a part of the Government's investigation to determine whether or not Sections 1, 2 or 3 of the Sherman Act had been violated, a theory for which the Court found no precedent when granting the Rule 34 motion.

The motion is not directed at the documents which this defendant produced in the course of the grand jury proceedings. Those documents, which were the subject of the

[fol. 1811] Rule 34 motion are and have long been in the defendant's hands. This motion asks that the Government be required to deliver to this defendant any and all copies of, excerpts from, and all notes, analyses, summaries and other writings concerning such documents which the plaintiff or its counsel may have.

The defendant cites no authority for the contention stated first in its brief, that it was illegal and improper and constituted an abuse of process for the Government's counsel to take to the offices of the Department of Justice in Washington, D. C., copies of, excerpts from, and notes, analyses, summaries and other writings concerning documents produced in the grand jury proceedings (Deft's Brief, pp. 2-3). It can cite no authority for the proposition since as we pointed out in brief and argument on the Rule 34 motion, a holding that such action was improper would make it impossible for the Attorney General, the Assistant Attorney General, Antitrust Division, and the attorneys in the Department of Justice properly to perform the duties of enforcing the Sherman Act imposed on them by law. The Attorney General as head of the Department of Justice is responsible for the enforcement of the Sherman Act, the direction of proceedings to determine whether there have been violations as well as proceedings to punish or to prevent and restrain such violations (5 U.S.C.A. 291; Statement of Organization and Functions of the Department of Justice, 11 Fed. Reg. Vol. 177 at pp. 177A-102 through 177A-114; Reorganization Plan No. 2 of 1950, note following 5 U.S.C.A. 291). He is directed by law as well as by the necessities of his office to be "at the seat of the Government," Washington, D. C., and to maintain offices of the Department of Justice there (5 U.S.C.A. 291). Unless attorneys under him can bring to the offices of the Department of Justice in Washington, copies of, excerpts from, and notes, analyses, summaries and other writings concerning documents relating to violations of law, the Attorney General and his principal assistants must either perform their duties blindly by guess or absolute delega-
[fol. 1812] tion; or haphazardly by traveling to as many Districts where investigations are being carried on as time will permit. Neither Congress nor any court has ever contemplated that the Attorney General and his assistants

should thus perform their duties of determining whether or not there have been violations of the Sherman Act, of determining what proceedings to institute to deal with such violations and of directing such proceedings.

Defendant's citation of *United States* v. *Silverthorne*, 251 U.S. 385, 392 (1920) (Deft's Brief, p. 3) adds no strength to its contention. The passage from which the defendant has patched together its quotations followed a determination by the Court that the facts in question had been obtained in a search carried out without warrant or process while the owners of the premises were being held under arrest so that they could not object to the search. Defendant's only authority for its claim that the Government's conduct in the instant case was improper is its own statement.

Defendant's second contention, that plaintiff should deliver to it any and all copies, notes, excerpts, analyses, summaries and other writings "because the Grand Jury proceedings in connection with which the originals were obtained has long since been terminated without any indictments against Procter or any of the companies which became defendants in this case" (Deft's Brief, p. 3), seeks, once again, to separate the Government's function of determining whether or not there have been violations of the Sherman Act from its function of carrying out proceedings to prevent and restrain such violations. As was set forth in briefs and argument in the Rule 34 proceeding, Section 4 of the Sherman Act, the section under which the instant civil action was brought, is simply an ancillary provision to Sections 1, 2 and 3 which establish and define crimes. The civil action may be brought only " to prevent and restrain violations" of the Act's criminal provisions. (15 U.S.C.A. § 4). Defendant's contention is that the Government should not have or use in preparing and trying the the civil action, copies, excerpts, notes, analyses, summaries, [fol. 1813] and other writings made in the course of proceedings in which it determined that the Sherman Act has been violated. There are no precedents so holding. And there should be none since the rule which defendant seeks to create would force the Government to prepare and try the civil action to prevent and restrain violations of the Sherman Act without benefit of working papers prepared

by it in the course of the valid and proper proceedings in which it determined that the Sherman Act has been violated. Neither of the cases which defendant cites so holds.

United States v. *Wallace*, 336 U. S. 798 (1949) dealt with documents which originally came into the hands of the Government under process of a legally non-existent grand jury. Determination that the grand jury was legally non-existent was made in a proceeding seeking dismissal of an indictment which that purported grand jury had returned. In its incidental use of the language quoted by defendant at page 4 of its brief, "Return of the photostats, like return of the originals, necessarily follows from the dismissal of the indictment," the Court was merely stating that the Government could keep neither originals nor copies of documents which came to it under process which had no proper legal foundation. In the instant case the documents from which the copies, notes, excerpts, analyses, summaries and other writings sought by defendant were made, came to the Government under proper process of a duly authorized Grand Jury in the course of an investigation to determine whether the Sherman Act had been violated.

In *Application of Bendix Aviation Corporation* (S.D.N.Y. 1945), 58 F. Supp. 953, the Court of the Southern District of New York did not require the Government to deliver all copies, all notes, all excerpts, all analyses, all summaries, or all other writings concerning the documents in question. The Court permitted the Government to retain the original documents pending application for an impounding order in the District of New Jersey and simply [fol. 1814] required the Government to deliver photostatic copies of the documents to the movant for its use while the application was pending. And when the matter came before this Court in the District of New Jersey, Judge Meany sanctioned the Government's retention of copies—his order provided that though the impounding order for the originals was denied, the Government was authorized to introduce *copies* if the defendant failed to produce the originals at trial (Civil Case No. 2531, Order March 19, 1945). *Application of Bendix* thus is authority for the denial of the defendant's motion in the instant case.

Defendant reveals the actual purpose of its motion in

what it calls its third "practical reason" for the motion at page 4, subparagraph (c), of its brief (see also page 3, paragraph 9, of the affidavit of Kenneth C. Royall dated June 4, 1953). That purpose is to probe into the thought processes of counsel for plaintiff in order to learn what documents counsel for plaintiff have heretofore chosen to copy, what excerpts and notes they have made, and how they have analyzed, summarized and reported in other writings as to the contents of documents.

Defendants thus are attempting through this motion to invade the professional privacy of the attorneys for the Government. They could not do so in a motion to enforce any discovery right established by the Rules of Civil Procedure. As the Supreme Court stated in *Hickman* v. *Taylor*, 329 U.S. 495, 512 (1946):

> . . . the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.

Defendants cannot in the instant situation make any showing to justify production since the documents concerning which they seek copies, notes, excerpts, analyses, summaries and other writings are already in their hands. This is not a situation where the invasion of professional [fol. 1815] privacy is an unfortunate incident to the obtaining of essential facts. Defendant here has the facts and is seeking to probe opposing counsel's thought processes without any justification at all.

Defendant's statements in its Brief that it has received no information as to what documents plaintiff considers relevant ignores plaintiff's Rule 34 motion and plaintiff's statements in connection with it. Furthermore, though counsel for defendant may not have received it at the time of filing its brief, counsel for plaintiff mailed to counsel for the defendant on June 4, 1953 an initial designation of documents to be copied pursuant to the order of May 27, 1953.

Counsel for plaintiff do desire to inform the Court that they contemplate that this defendant and all the other defendants in this case will at the proper time be entitled to designations of the documents on which the plaintiff intends to rely at trial. Counsel for plaintiff have on more than one occasion informed this defendant and the other defendants of plaintiff's intention to furnish them with such designations when they can practicably be prepared. The plaintiff hereby reiterates that statement. Attempts to prepare such listings at this time would serve no useful purpose for any one, but simply serve to burden and mislead everyone.

Defendant's other so-called "practical reasons" for the motion (Deft's Brief, p. 4, subparagraphs (a) and (b)) lend no justifying strength.

As to defendant's first "practical reason" (subparagraph (a), p. 4, Deft's Brief), there is no burden on the plaintiff to show why it should retain its working papers; there is a burden, as shown above, on defendant to establish adequate reasons why plaintiff should not retain its working papers inviolate and unrevealed. Nevertheless we have set forth in this brief compelling reasons why plaintiff should retain "these writings." The fact that plaintiff is entitled under the order pursuant to Rule 34 to have copies of documents with which to do further [fol. 1816] work, gives no justification for the order here sought which would divest it of working papers prepared earlier.

Defendant's second "practical reason" gives no justification. Since the order of May 27 provides that the plaintiff shall bear the expense of photostating and that the defendant may produce the documents for photostating either at Cincinnati or New York as it chooses, compliance with the order of May 27 casts no appreciable burden on the defendant and it has no appreciable need for simplification of compliance or alleviation of time and trouble caused it by the Order.

If the plaintiff were suing this defendant in a proprietary capacity or if the plaintiff were a private party, there would, thus, be no justification for the defendant's probing of plaintiff's counsel's thoughts by obtaining its working papers and the motion would have to be denied

on that ground alone. Because the plaintiff is the United States of America suing in the governmental capacity of enforcing its laws, the motion should be denied for the further reasons that many of the copies, excerpts, notes, analyses, summaries, and other writings sought by the motion are confidential records of the Department of Justice, revelation of which is prohibited by Government regulation and which are therefore privileged. (Attorney General's Order No. 3464, Supplement No. 4, Revised January 13, 1953; Barron and Holtzoff, vol. 2, pp. 323-4.)

Conclusion

Since the defendant has shown neither legal nor factual justification for the motion and since the order sought would hamper plaintiff's preparation of its case by divesting it of working papers and would violate public policy by compelling revelation of plaintiff's counsel's profes- [fols. 1817-1819] sional privacy and by compelling revelation of privileged Government papers, it is respectfully submitted that the motion should be denied.

Dated: June 15, 1953.

(S.) Walker Smith, (S.) J. Fergus Belanger, (S.) Norman J. Futor, (S.) Robert Brown, Jr., (S.) Estella L. Baldwin, Trial Attorneys, United States Department of Justice.

[fols. 1819a-1820] [File endorsement omitted]

[fol. 1821] In the United States District Court for the District of New Jersey

[Title omitted]

Reply Brief in Support of Motion by Defendant, the Procter & Gamble Company, for Return of Copies and Other Writings—June 18, 1953

Without admitting any of the facts, inferences or conclusions set forth in the plaintiff's brief, defendant The

Procter & Gamble Company (Procter) replies to certain features of such brief:

I

As to the plaintiff's retention of copies, notes and the like of papers produced by Procter before the Grand Jury, Judge Forman provided that the papers so produced should be retained in certain rooms in Newark. The plaintiff in 1951 requested Procter's consent to take the papers to [fol. 1822] Washington. Procter was unwilling but offered to take the matter up promptly with Judge Forman. Some time later Procter learned that without its consent or notice to it, and without any authority from Judge Forman, the plaintiff made copies, notes and the like, and took them to Washington, and has since refused to return them to Procter despite the termination of the Grand Jury proceedings seven months ago. This, as we contend, was improper and an abuse of process, and the copies, notes and the like should be returned to Procter.

II

As to the relevancy of the papers produced before the Grand Jury, the plaintiff has from time to time stated that at the "proper time" plaintiff will designate the papers on which it intends to rely at the trial. However, there has been no such designation nor any showing of relevance as to even a single paper.

The plaintiff did recently furnish Procter a list of Grand Jury papers to be photostated, under the Court's order of May 27, 1953, which list included the major part of all the document numbers produced by Procter before the Grand Jury, but even then stated that it was only an "initial [fol. 1823] listing". This list contained only the assigned numbers of the papers with no statement as to relevancy or as to plaintiff's reliance on the documents. For a period of two years—since the issuance of the Grand Jury subpoenas—Procter has been without any designation of the relevancy or proposed use of any paper or document in relation to any charge or allegation. We contend that Procter is entitled to the copies, notes and the like of its own papers for such aid as they may give on these questions of relevancy or future use in this case.

III

As to plaintiff's pleas of "confidential" and of "professional privacy". Procter denies the validity of these pleas. The plaintiff cannot make its own rules for what it will and will not disclose, and this is true whether plaintiff acts through the Attorney General or anyone else. Certainly copies taken by plaintiff from Procter's own documents cannot violate any professional privacy. And it seems beyond doubt that notes and other data taken therefrom would in no manner invade the confidence or privacy of the plaintiff and its counsel.

[fols. 1824-1827] Conclusion

For the above reasons, as well as those previously stated in briefs, affidavits and arguments before the Court, the relief requested in Procter's motion should be granted.

Dated: June 18, 1953.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By John A. Ackerman, 810 Broad Street, Newark, New Jersey. R. W. Barrett and Jos. C. Dinsmore Per (illegible), Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 1827a] [File endorsement omitted]

[fol. 1828] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

BRIEF OF THE UNITED STATES IN SUPPORT OF ITS MOTIONS FOR PRODUCTION OF DOCUMENTS UNDER RULE 34—September 23, 1954

The United States has moved under Rule 34 of the Federal Rules of Civil Procedure for orders directing each of the three manufacturing defendants in this case, Colgate-Palmolive-Peet Company, Lever Brothers Company, and The Procter & Gamble Company, (hereinafter referred to as "Colgate", "Lever", and "Procter"), to produce for inspection and copying certain designated documents. This brief is submitted in support of these three motions.

Nature of the Action

The complaint charges that beginning in 1926 the defendants have combined and conspired unreasonably to restrain and to monopolize trade and commerce in the production and sale of household soap and household synthetic detergents in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C., Secs. 1 and 2); and that Procter, Lever, and Colgate are now monopolizing, and for at least fifteen years prior to the filing of the complaint have continuously monop- [fol. 1829] olized, the production and sale of these products in violation of Section 2 of the Sherman Act Par. 32). The complaint further charges that the combination and conspiracy among the defendants has consisted of a continuing concert of action the principal objectives of which have been to attain and exploit positions of dominance over all others, and to restrict and control competition with each other and with all others, in the production and sale of household soap and household synthetic detergents and in the purchase and sale of the principal raw materials used in them (Par. 33).

The scope and nature of these charges is indicated in the numerous specific allegations set forth in the complaint concerning concerted activities of Procter, Lever and Colgate in furtherance of their objectives (Par. 34). Pur-

suant to the defendants' purpose to restrict and control competition and to attain and exploit positions of dominance in the household soap and household synthetic detergent industry, it is alleged that Procter, Lever and Colgate have employed the following means, among others:

(1) exchanging information concerning prices, terms and conditions of sale, advertising and promotional methods, raw material purchases and prices, and other business details;

(2) controlling and fixing the prices at which their household brands are sold by themselves and by retailers, and at which they purchase inedible tallow and grease;

(3) making "confidential deals" in which prices paid for tallow and grease are concealed in order to avoid affecting published market prices or the market positions of other buyers and sellers;

(4) controlling and regulating their use of advertising and promotional methods;

(5) employing methods of couponing, special deals and other promotional devices designed to secure advantages for the defendants' brands in the allocation of retail shelf space and to obstruct the promotion and sale of household soap and synthetic detergents produced by other manufacturers;

(6) sharing, by cross licenses to the exclusion of others, significant patents and patent rights;

[fol. 1830] (7) purchasing and agreeing to purchase substantially all of the available supplies of base materials used in the production of synthetic detergents, and inducing principal producers of such base materials to concentrate upon the production of them for sale to Procter, Lever, and Colgate and, to discontinue or curtail production of synthetic detergents; and

(8) restricting and controlling competition in the production and sale of glycerine by curtailing production, fixing prices, and exchanging information.

Prior Developments in This Action

This action was instituted on December 11, 1952, following a comprehensive investigation of the household soap

and household synthetic detergent industry. In March, 1953, plaintiff moved for an order under Rule 34 requiring Procter to produce for inspection and copying a number of documents and records previously produced pursuant to subpoenas isued by a grand jury. An order granting this motion was entered by the Court on May 27, 1953. Thereafter, on July 14, 1953, the Court entered stipulated orders requiring Lever and Colgate to produce for inspection and copying documents previously produced by them in the course of the grand jury investigation.

On June 4, 1954, Procter made two motions, one to require plaintiff to return all copies of its documents, together with all notes and other writings prepared from them; and the other, to suppress the use by plaintiff prior to or during trial of all documents submitted by Procter or any other person or firm to the grand jury, and all evidence, notes, etc., obtained from them. These motions were denied by the Court in orders entered on January 14, 1954.

Pursuant to requests by counsel for Procter, Colgate and Lever for reconsideration by the Department of Justice of the advisability of continuing this case against any or all of the defendants, the Assistant Attorney General in Charge of the Antitrust Division accorded counsel [fol. 1831] for each of the defendants individually an opportunity, on March 16, 17, 18 and 19, 1954, to present facts and arguments on its behalf. On July 16, 1954, he notified counsel for each of the defendants that, after careful consideration of the matters presented to him, he had concluded that the Government should proceed with the case.

Argument

I

The Documents Called For Are Necessary To Supplement Evidence Obtained Through Prior Investigation And Discovery

All of the documents sought by these three motions relate either to significant activities of the defendants during periods of time not included in the prior discovery, or to significant activities partially disclosed by information previously obtained.

Thus, Paragraphs 1, 3, 4 (except in the case of Procter), 5, 6, 7, 8 B), 8 C), 10, 12, 14, 15, 18 A), 20 and 23 of each motion call either entirely or in part for documents which bring substantially up to date documentary material previously called for or produced for earlier periods.

Paragraphs 5, 13, 14, 15 and 20 of each motion call either entirely or in part for documents which supplement documentary material previously called for or produced for other, limited periods of time.

Paragraphs 2, 4 (in the case of Procter only), 8 A), 8 D), 8 E), 8 F), 9, 11, 16, 17, 18 B), 19, 21, 22, 24 and 25 (Procter only—no similar request is included in the Colgate and Lever motions) of each motion call for documents the existence and relevancy of which is disclosed by documents or information previously obtained.

[fol. 1832] The practical necessity for plaintiff to obtain production of these documents in order to complete preparation of its case, and the fact that such production will facilitate the trial of this action, is sufficiently demonstrated, it is submitted, by the affidavit of Joseph E. McDowell, Trial Attorney of the Department of Justice, which was filed with each of these motions.

II

All Of The Documents Called For Are Relevant To Matters Involved In This Litigation

Rule 34 of the Federal Rules of Civil Procedure authorizes the Court to compel the production of such material, not privileged, as constitutes or contains evidence relevant to the subject matter involved in the pending action. *Michel* v. *Myer*, 8 F.R.D. 464, 475 (W.D. Pa. 1948); *Frasier* v. *Twentieth Century-Fox Film Corp.*, 119 F. Supp. 495, 498 D. Neb. 1954).

The courts have repeatedly said that Rule 34 must be liberally construed [See, for example *United States* v. *Procter & Gamble Co.*, 14 F.R.D. 230, 232 D. N.J. 1953)], particularly where the complaint alleges a conspiracy, as in this case. *United States* v. *United States Alkali Export Association, Inc.*, 7 F.R.D. 256 (S.D.N.Y. 1946) at p. 259, and cases there cited. See also *Quemos Theatre Co. Inc.* v. *Warner Bros. Pictures, Inc.*, 35 F. Supp. 949, 950 (D.C. N.J. 1940).

The documents designated in the motions now before the Court all relate to matters pleaded in the complaint and are there relevant to the subject matter involved in the pending litigation. Paragraphs 1, 2, 6 and 23 call for documents pertaining to profits, assets, size, sales or market position of each of the defendants, vis-a-vis one another and others in the industry. These documents relate primarily to the charges in the complaint involving dominance and monopolizing (Pars. 32, 33).

[fol. 1833] Paragraphs 3, 4, 5, 11 and 12 call for documents relating to each of the defendants' and other manufacturers' prices (on both factory and retail levels), price changes, and costs. These documents are principally related to the charges regarding monopolizing and restriction and control of competition (Pars. 32, 34 A)).

Paragraphs 7, 8 A) and 8 B) call for documents relating to patents, patent licenses and agreements, and patent litigation. The documents in this group relate most directly to matters involved in the charges regarding monopolizing and restriction and control of competition (Pars. 32, 34 A)).

Paragraphs 8 C), 8 D), 8 E), 8 F), 9 and 10 call for documents relating to the procurement, processing and production of finished synthetic detergents and synthetic detergent base materials. These documents relate principally to matters involved in the charges concerning monopolizing the production and sale of household synthetic detergents (Pars. 32, 34 A), 34 B)).

Paragraphs 13, 14, 15 and 16 call for documents concerning purchases and prices of tallow and grease, primary raw materials used in the production of soap. These documents relate primarily to the charges regarding the restraint and control of competition by the defendants in the purchase and sale of these materials (Pars. 32, 34 B)).

Paragraphs 17, 18, 19, 20, 21, 22 and 24 call for documents pertaining to advertising and promotional expenditures and campaigns. These documents relate most directly to matters involved in the charges regarding the combination and conspiracy to monopolize, and the attainment and exploitation of dominant market power (Pars. 32, 34 A)).

Finally, Paragraph 25 of the motion addressed to Procter calls for documents from that defendant relating to a pro-

posed acquisition. These documents relate primarily to the charges concerning the attainment and maintenance [fol. 1834] of dominant power (Pars. 33, 34 A)).

It should be noted that all of the documents called for by these motions are of the same type and character as were ordered produced before the grand jury by Judge Forman of this Court. Moreover, the affidavit of Joseph E. McDowell, referred to *supra*, p. 5, testifies to their relevance and bearing on the matters involved in this litigation.

It is submitted that this Court, on plaintiff's previous motion under Rule 34, determined for these reasons that documents of the same nature here called for are relevant within the meaning of Rule 34. This Court stated in its opinion:

> The Government's attorney filed a statement under oath that the exhibits " . . . are relevant or material to the issues of this cause and are needed to aid the plaintiff in the preparation of its case . . . ." The fact that Judge Forman felt after extended hearings that the same documents were pertinent to the Government's case in the criminal proceedings lends strong support to plaintiff's statement. *United States* v. *Procter & Gamble Co.*, supra, at p. 233.

III

The Documents Called For Are Designated With Sufficient Particularity

The designation of the documents called for in the manner employed in these motions, i.e., by categories relating to specific topics, has been approved by the Supreme Court in the case of grand jury subpoenas duces tecum. *Brown* v. *United States*, 276 U.S. 134 (1928); *Consolidated Rendering* v. *Vermont*, 207 U.S. 541 (1908). The word "designated" in Rule 34 was construed by the Advisory Committee on Rules for Civil Procedure as covering the manner of designation referred to in these decisions and followed in these motions. Report of the Advisory Committee on Rules for Civil Procedure (1947), p. 97.

The district courts have repeatedly followed the construction emphasized by the Advisory Committee in passing

[fol. 1835] upon the adequacy of designation in Rule 34 demands.

United States v. *United States Alkali Export Association, Inc.*, *supra*, p. 5

United States v. *North Coast Transportation Co.*, 8 F.R.D. 62 (W.D. Wash. 1947)

United States v. *United Shoe Machinery Corp.*, 76 F. Supp. 315 (D. Mass. 1948)

Hawaiian Airlines, Ltd. v. *Trans-Pacific Airlines, Ltd.*, 8 F.R.D. 449 (D. Hawaii 1949)

In the *Alkali Export Association* case, the court ordered discovery of documents relating to "the negotiation, execution, operation or interpretation" of contracts. That case was followed by Judge Wyzanski in the *United Shoe Machinery* case in upholding a category type of designation as being in the interest of expediting the trial and achieving justice.

IV

Good Cause Has Been Shown By The Plaintiff For Requesting Production Of The Designated Documents.

The United States has stated *supra*, pp. 4-5, the reasons why the documents sought by these motions should be ordered produced. In addition, the relevance of the documents sought to the matters involved in this litigation has been shown, pp. 5-7. Although there is no clear definition of what constitutes "good cause" within the meaning of the Rule, the relevancy and materiality of the matter sought is an important element in the determination of whether there exists good cause. *Wild* v. *Paxson*, 7 F.R.D. 495, 499 (S.D.N.Y. 1946).

Particularly in cases such as this, where plaintiff must rely on documents in the possession of the defendants to help it prove its case, it has been held that good cause is shown if the documents called for are relevant. See *Caplin* v. *United Feature Syndicate, Inc.*, 8 F.R.D. 424, 425 [fols. 1836-1837] (S.D.N.Y. 1948) where the Court stated:

> Since the plaintiff must establish, if he can, his alleged claims by documents, most of which are in the possession of the defendants, he has shown the required "good cause" for the production and inspection of all documents under the defendants' control which constitute or contain any evidence relative to

the subject matter involved, whether or not they will be admissible at the trial, if the same appear to be reasonably calculated to lead to the discovery of admissible evidence.

The necessity for the documents sought is also a prime consideration in determining whether good cause has been shown; but above all, the liberal objectives of the Rule should be the touchstone. See *Gordon* v. *Pennsylvania Railroad Co.*, 5 F.R.D. 510 (E.D. Pa. 1946), where Judge Kalodner remarked:

> What constitutes good cause is a difficult question. The elements are suggested in 2 Moore's Federal Practice, Section 34.04. A liberal construction is, of course, desirable. *United States* v. *Dondera*, D.C.E.D.N.Y. 1939, 28 F. Supp. 223. Considerations of practical convenience are of importance. So also, the Court should be satisfied that production of the requested document is necessary to enable a party to prepare his case, or will facilitate proof or progress at the trial. These must be the considerations, at least, given prominence by the Court. In the long run, whether the order to produce a particular document will be granted is a matter for the exercise of the Court's discretion, and the attempted statement of the rule results only in diminishing the desired flexibility of the Civil Rules. See 2 Moore's Federal Practice, Section 26.12 (as amended in the 1945 Cumulative Supplement, and see note 15 therein). It is sufficient guidance to keep in mind the liberal objectives of the Civil Rules.

Conclusion

It is respectfully submitted that for all of the reasons given above this Court should exercise its discretion in favor of granting these motions.

Dated: September 23, 1954.

(S.) Joseph E. McDowell, (S.) Robert Brown, Jr.,
(S.) Daniel H. Margolis, Trial Attorneys.

[fols. 1837a-1888] [File endorsement omitted]

[fol. 1889] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

AFFIDAVIT—October 4, 1954

STATE OF NEW YORK, County of New York, ss:

WILLIAM L. MCGOVERN, being duly sworn, deposes and states:

1. I am an attorney for Lever Brothers Company, a defendant in the above-entitled action. I have been associated with this case since its inception, and I am personally familiar with all aspects of the matter since the initiation in May 1951 of the grand jury proceedings which preceded the complaint in this action.

2. This affidavit is made in behalf of Lever Brothers Company in opposition to a motion by Plaintiff dated August 20, 1954, as amended by notice dated September 23, 1954, for an order requiring Lever Brothers to produce for inspection and copying certain books, records and documents.

3. This is the fifth demand for documents which Plaintiff has made of Defendant. Documents have heretofore been produced by Lever Brothers under the following circumstances:

[fol. 1890] (a) A grand jury subpoena, returnable May 29, 1951, was served upon Lever Brothers, calling for a host of documents and records covering the period 1924 to April 30, 1951. Upon motion to quash seasonably made, this subpoena was sustained in part and quashed in part by Judge Forman. Under the subpoena, as thus modified, a substantial volume of records and books were turned over or made available for inspection to representatives of the Antitrust Division acting as agents for the grand jury.

(b) A grand jury subpoena, returnable June 19, 1951, was served upon Lever Brothers demanding a staggering volume of books, records and documents and embracing 80 percent of the more than 23,000 file drawers in the

company's offices, archives and warehouses. After lengthy and careful consideration of this subpoena, Judge Forman drastically reduced the burden and scope of the demands. He quashed some of the Government demands outright; other demands were sharply limited as to time and type of document; and still others were quashed without prejudice to the right of Plaintiff to renew its demand upon a proper showing. Even as thus severely curtailed, Lever Brothers produced some 30 filé drawers comprising approximately 150,000 documents.

(c) A grand jury subpoena, returnable June 9, 1952, was served upon Lever Brothers. This subpoena had the purpose and effect of updating the subpoenas described in (a) and (b) above and called for a further substantial volume of books and records for the year 1951. After a motion to quash was seasonably made by Lever Brothers, a consent order was entered on June 16, 1952, fixing the time and mode of compliance with this subpoena, and a substantial additional volume of books, records and documents was turned over to the Government.

[fol. 1891] The originals of a vast number of documents called for by the three subpoenas described above were so essential to the current conduct of the company's business, that photostatic copies were prepared by Lever Brothers at a substantial expenditure of time and money.

The grand jury before whom the aforesaid documents were produced was discharged without any indictment having been returned. Plaintiff thereupon filed the complaint in this action on December 11, 1952, and thereafter returned to Lever Brothers Company the documents previously turned over to it pursuant to the grand jury subpoenas described above.

(d) Plaintiff desired to use the documents previously produced by Lever Brothers in response to the grand jury subpoenas as though they had been produced pursuant to motion and order under Rule 34, F.R.C.P. Lever Brothers, in turn, desired access to documentary material which the Government had obtained during the course of the grand jury proceedings from parties other than the defendants in this case ("third persons"). In lieu of discovery and cross discovery proceedings under Rule 34;

which would unnecessarily have burdened the Court, counsel for Lever Brothers Company and counsel for the Plaintiff agreed upon the following procedure:

(i) Lever Brothers agreed to return to the Plaintiff for inspection and copying such of those documents previously produced under grand jury subpoenas as the Plaintiff might from time to time designate;
(ii) Plaintiff agreed to make available to Lever Brothers a list of all third persons whose documents had been or still were in possession of Plaintiff and [fol. 1892] to make available for inspection and copying the documents of such third persons as agreed to such inspection and copying by Lever Brothers Company, without prejudice to the right of Lever Brothers to move this Court for an order requiring the Plaintiff to produce the documents of all such third persons for inspection and copying, irrespective of consent of such third persons; and
(iii) the Government agreed to supply Lever Brothers from time to time a designation of the documents on which it proposes to rely at the trial of this case.

4. These arrangements resulted in two orders of this Court dated July 14, 1953 and July 15, 1953. Although the understandings embodied in the orders of July 14 and July 15, 1953 were negotiated with Walker Smith, Special Assistant to the Attorney General, who preceded Mr. McDowell in this case, they have been observed by Lever Brothers with the utmost good faith, and during the previous five or six months since Mr. McDowell has been in charge of the case, Lever Brothers has been diligent in examining the documents made available to it by the Government and in making available to the Government such of its documents as the Government requested from time to time.

5. Pursuant to this discovery arrangement and on May 15, 1953, Assistant Attorney General Barnes furnished Lever Brothers with the names of seventy-two (72) third persons from whom the Government had obtained documentary material (Exhibit A attached hereto). Plaintiff thereafter undertook to communicate with each of these

third persons to ascertain whether they would consent to an examination by defendants. On June 23, 1953, the [fol. 1893] Plaintiff advised Lever Brothers that thirty-three (33) companies had stated that they had no objection to an examination of their documents by counsel for the Defendants.

6. Several additional firms subsequently consented to the examination. A substantial number of such third persons demanded the Plaintiff return their documents and refused to consent to inspection by counsel for the Defendants. Defendants have continuously sought permission from such companies to examine their files in lieu of proceedings under Rule 34 to compel production of such files. Such negotiations are still in progress with such companies.

7. Counsel for Lever Brothers, jointly with counsel for the other Defendants, have been continuously engaged in diligently examining the documents of the third persons who consented to such examination. This examination has thus far entailed consideration of hundreds of thousands of documents turned over to the United States by third persons such as Armour & Co., Swift & Co., Wilson & Co., Allied Chemical and Dye Corporation, Standard Oil of California, Continental Oil Company, and Monsanto Chemical Corporation. Because the documents of many third persons were returned by the United States to the companies which furnished them, counsel for Defendants have been required to travel to various points throughout the United States in order to complete the examination of such documents. For this reason, as well as for the tremendous volume of documents involved, the cross discovery of the third persons who consented to the examination of their documents is not yet completed, and the cross discovery of third persons who withheld their consent has not yet begun. It is, therefore, presently impossible to estimate how many additional tens of thousands of documents remain to be examined.

[fol. 1894] 8. During the same period and pursuant to the order of July 14, 1953, Lever Brothers transmitted voluminous files aggregating approximately 30,000 documents to the Plaintiff on August 3, 1953. Additional files

were transmitted to the Plaintiff on March 8, 1954. From time to time Plaintiff has returned to Lever Brothers various documents. Such a return was made on September 15, 1953, October 29, 1953, and November 12, 1953.

9. On July 9, 1954, the Plaintiff asked Lever Brothers by letter to deliver for further examination certain files, heretofore delivered to Plaintiff and returned to the Defendant. Plaintiff also asked that Lever Brothers furnish various additional files which Lever Brothers had agreed to hold for examination pursuant to the order of July 14, 1953. In response to this demand, twenty-three files containing approximately 100,000 documents were furnished to Plaintiff in July of this year and only a few days ago, on September 28, 1954, an additional 10,000 to 15,000 documents were furnished to Plaintiff by this Defendant. Defendant Lever Brothers has not been informed that additional such demands will not be made in the near future.

In sum, pursuant to the order of July 14, 1953, Lever Brothers transmitted to the Plaintiff between 45,000 and 50,000 documents, including about 20,000 furnished since July 9th of this year.

10. Upon information and belief, counsel for the Government have not yet completed the examination and analysis of the thousands of documents delivered by Defendant Lever Brothers in July 1954 and a few days ago on September 28, 1954. Plaintiff undertook to return these documents to this Defendant when it had completed its examination but it has not yet done so.

[fol. 1895] 11. Plaintiff has not yet designated which of these documents it intends to use, although it undertook to do so in the discovery agreement which resulted in the orders of July 14, 1953 and July 15, 1953. As the foregoing shows, the Government now has obtained copies of more than 30,000 documents of Lever Brothers alone and is presently examining an additional 20,000-25,000 of which they may retain a substantial number. Taken in conjunction with the documents previously obtained by the Plaintiff from other Defendants and third parties, the Plaintiff has presently in its possession hundreds of thousands of papers.

12. The fifth demand embodied in the present motion calls for the production of additional masses of documen-

tary material. The pending motion for discovery will require Lever Brothers to produce for inspection and copying approximately 200,000 documents. If any substantial number of these documents are copied by Plaintiff, the Plaintiff will have in its possession copies of approximately 75,000 documents of Lever Brothers alone. This number must necessarily be augmented by additional tens of thousands of documents obtained from the other Defendants—and this before the Plaintiff or the Defendants have completed examining and digesting the documentary mass presently available to them.

13. As the foregoing shows, the discovery and cross discovery contemplated by the orders of July 14, 1953 and July 15, 1953 are still being carried forward diligently, and none of the parties has completed the exchange or analysis of the documents covered by those orders. However, if the instant motion is granted, the entire attention of counsel must be diverted to a further search of the files [fol. 1896] and a selection of the masses of documents called for by the motion. Consequently, the grant of this motion at this time can only disrupt the orderly schedule of the pending discovery, delay for months the completion of analysis of the documents already exchanged, and forestall an early designation by the Government of the documents on which it intends to rely, so essential to an orderly and expeditious trial of this case.

William L. McGovern.

Subscribed and sworn to before me this 4th day of October 1954.

Florence B. Bisch, Notary Public. (Seal)

Florence B. Bisch, Notary Public, State of New York, No. 41-5326400, Qualified in Queens County, Certificate Filed in New York County. Commission Expires March 30, 1956.

[fol. 1897] EXHIBIT A TO AFFIDAVIT

Department of Justice
Washington 25, D. C.
May 15, 1953

Abe Fortas, Esquire
Arnold, Fortas & Porter
1229 Nineteenth Street, N.W.
Washington, D. C.

Re: United States v. The Procter & Gamble Company, et al

DEAR MR. FORTAS:

Pursuant to the conference held May 1, 1953, we are enclosing Plaintiff's General List No. 1 in Discovery Negotiations.

Sincerely yours, (S.) Stanley N. Barnes, Assistant Attorney General.

Enclosure No. 55322.

[fol. 1898] UNITED STATES

v.

THE PROCTER & GAMBLE COMPANY, ET AL

Civil Action No. 1196-52

District of New Jersey

Discovery Negotiations

Plaintiff's General List No. 1, (May 15, 1953)

Non-defendants whose documents (or copies thereof) are or have been in possession of plaintiff's trial staff:

Allied Chemical and Dye Corporation.
American Hyalsol Corporation.
American Hyalsol Export Corporation.
Armour and Co.*

* Some documents from this non-defendant were returned prior to May 1, 1953 without retention of copies.

Atlantic Refining Co.
California Research Corporation.
(Standard Oil Company of California)
Cohen, Roy M.
(Butcher's Advocate Publishing Co., Inc., New York City)
Continental Oil Company.
E. I. duPont de Nemours & Company.
Economics Laboratory Inc.
Economy Grocery Stores.
Federline, Andrew P.
Fels and Company.
First National Stores Inc.
E. F. Forbes.
(Western Meat Packers Association, San Francisco)
E. H. Frey Co.
General Dyestuffs Corporation.
Gillam Soap Works.
The Glidden Company.
Hergott & Wilson.
Hockwald Chemical Co.
E. F. Houghton & Co.
~~Hrummel~~ Chemical Company.
Iowa Soap Co.
E. G. James Co.
Kamen Soap Products Co., Inc.
Kohnstam & Co., Inc.
Kulman & Co.
Laurel Soap Manufacturing Company, Inc.
Los Angeles Soap Co.
Manhattan Soap Co.
Michel Export Company.
Monsanto Chemical Co.
Mt. Hood Soap Co., Inc.
National Oil Products Co., Inc.
Newell Gutradt Company.
A. C. Nielsen & Co.
North Coast Chemical & Soap Works Inc.
Nu Bora Soap Co.

---

* Some documents from this non-defendant were returned prior to May 1, 1953 without retention of copies.

Onyx Oil & Chemical Company.
* [fols. 1899-2048] Oronite Chemical Company.
(Standard Oil Company of California)
Pioneer Soap Company.
Pratt Bros. Co., Inc.
Purex Corporation Ltd.
Richards Chemical Works, Inc.
(Onyx Oil & Chemical Company)
Rhom & Haas Company.
Jos. Rosenberg's Sons, Inc.
Sharples Chemical Inc.
The Sharples Corporation.
Sharples-Continental Corporation.
(Continental Oil Company)
* Shell Chemical Corporation.
Shell Development Company.
* Shell Oil Company.
L. Sonneborn Sons, Inc.
Speciality Products Company.
Spiegel & Peiffer.
* Standard Oil Company of California.
* Swift and Co.
The Theobald Industries.
Tidy House Products Company.
Ultra Chemical Company.
Weaver & Hugi.
M. Werk & Co.
West Coast Soap Company.
White Mountain Laundry Company of North Conway, New Hampshire.
Wilbur-Ellis & Co.
Willitts & Co.
Wilson Brokerage.
= Wilson & Co.
Wise, Frank B.
Jacques Wolf & Co.
* Allen B. Wrisley & Co.

---

* Some documents from this non-defendant were returned prior to May 1, 1953 without retention of copies.

= All documents from this non-defendant were returned prior to May 1, 1953 without retention of copies.

[fol. 2049] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

REPLY AND SUPPLEMENTAL BRIEF ON BEHALF OF THE PROCTER & GAMBLE COMPANY IN SUPPORT OF ITS MOTION FOR AN ORDER DIRECTING DISCLOSURE OF GRAND JURY TRANSCRIPTS. —November 28, 1955

I. Contrary to Plaintiff's Contention, the Authorities support the proposition that access should be granted to the Grand Jury Transcripts under the circumstances of this case.

A court, in its discretion, and in the interests of justice, may require disclosure of the transcripts of Grand Jury testimony. The doctrine has long been recognized, and is well known to this Court. *United States* v. *White*, D.N.J., [fol. 2050] 104 F. Supp. 120; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4; *United States* v. *Rose*, 3 Cir., 215 F. 2d 617; *United States* v. *Alper*, 2 Cir., 156 F. 2d 222; *United States* v. *Byoir*, N. D. Tex., 58 F. Supp. 273, *aff'd* 5 Cir., 147 F. 2d 336; *Atwell* v. *United States*, 4 Cir., 162 Fed. 97; *In re Grand Jury Proceedings*, E. D. Pa., 4 F. Supp. 283; *In re Bullock*, D.C.D.C., 103 F. Supp. 639; *United States* v. *Farrington*, N.D.N.Y., 5 Fed. 343; Federal Rules of Criminal Procedure, Rule 6 (e); see also *Herzog* v. *United States*, 75 S. Ct. 349.

The vast majority of the cases relied on by plaintiff in support of a contrary rule (P's Brief, p. 3-4) are easily distinguishable as criminal cases in which an accused seeks to secure access to the Grand Jury minutes for the purpose of quashing the indictment on the ground that no competent evidence of guilt was presented to the Grand Jury. The judicial caution exercised in denying access in cases of this character is perhaps justified. If disclosure of Grand Jury transcripts were freely permitted under such circumstances, every accused would, in effect, have an appeal from the indictment.

Criminal cases of the type cited by plaintiff involve none of the circumstances discussed in Procter's motion [fol. 2051] and original brief which justify disclosure of

the Grand Jury testimony in this case and may, we submit, be disregarded.*

United States v. *General Motors Corp.*, D. Del., 15 F.R.D. 486, also relied on by plaintiff (P's Brief, p. 5-6), is fully discussed in the brief of other defense counsel. We merely add that it does not appear from the *General Motors* opinion that, as plaintiff admits in this case and this Court found (Procter's original brief, p. 3), the Grand Jury proceedings had been used by plaintiff to determine what action should be taken to enforce the antitrust laws "through criminal proceedings, civil proceedings or both" (opinion filed May 11, 1953, p. 4-5, 14 F.R.D. 230, 233; plaintiff's Aff. of March 21, 1953, p. 1).** Nor does it appear from the *General Motors* opinion that, as in the soap case, the Delaware court had, by order, nevertheless permitted the plaintiff to utilize in the civil proceeding papers and information obtained during the course of the [fol. 2052] Grand Jury proceeding (orders of January 14, 1955 in this case).

United States v. *Henry S. Morgan, et al.*, Civil Action No. 43-757, S.D.N.Y., Oct. 30, 1947, also relied on by the plaintiff (P's Brief, p. 5), has been thoroughly dealt with in the brief of other defense counsel. To avoid undue repetition, suffice it to say that the court in that case admittedly was influenced by Judge Hand's remark of thirty years ago in *United States* v. *Garsson*, S.D.N.Y., 291 Fed. 646, 649, that "no judge of this court has granted it. [inspection of Grand Jury minutes], and I hope none ever will." Judge Hand, of course, was speaking in the context of a criminal case in which the defendant was seeking to quash

---

* Indeed, in many of such cases, the courts concede that the Grand Jury minutes would be opened upon a sufficient showing of cause. *United States* v. *Perlman*, S.D.N.Y., 247 Fed. 158; *United States* v. *Silverthorne*, W.D.N.Y., 265 Fed. 853; *United States* v. *Ladlecker*, W.D.N.Y., 275 Fed. 976; *United States* v. *Olea*, E.D.N.Y., 21 F. Supp. 281; *United States* v. *Papaioanu*, D. Del. 10 F.R.D. 517.

** Plaintiff's comment (Brief, p. 4) that this Court has twice rejected Procter's assertion that plaintiff used the Grand Jury process to investigate and prepare this civil action is, therefore, plainly erroneous.

the indictment. There is no evidence in the *Garsson* opinion that he was concerned with Grand Jury secrecy, as such. He was rather concerned with matters of criminal procedure and it seems doubtful that he intended his remark to be relied upon in other contexts. Moreover, the Southern District of New York admittedly had, at least at that time, a severe rule in such cases. *United States* v. *Morse*, S.D.N.Y., 292 Fed. 273. Later opinions in the Second Circuit, in which Judge Hand joined, indicate that the rule has been relaxed, or does not apply, at least where there is no [fol. 2053] attempt to review an indictment. *United States* v. *Alper*, 2 Cir., 156 F. 2d 222; *United States* v. *Remington*, 2 Cir., 191 F. 2d 246. In the *Morgan* case, however, the somewhat casual presentation of the defendants' application did not suffice to shake the court's convictions based on Judge Hand's remark.

We submit, therefore, that neither *General Motors* nor *Morgan* require a denial of access to the Grand Jury transcripts in this case. Each case, including our own, should be viewed in its own setting and tested under the settled rule that the Court may order disclosure of the Grand Jury testimony where the interests of justice require. We submit, as more fully developed in Procter's motion and brief of September 24, 1954, that the ends of justice require that all of the transcripts of the Grand Jury testimony be made available to Procter in this case.

II. The recent deposition of Mr. Siddall emphasizes an additional reason for granting access to the grand jury testimony.

During plaintiff's deposition of Procter's witness, Siddall, questions were asked by plaintiff concerning matters which Siddall recalled were testified to by him before the Grand Jury. Procter objected to such questions on the [fol. 2054] Grand Jury ground. Moreover, the problem presented by such questions may well arise in future proceedings in this case.

As to such questions, and as to any Grand Jury witness who may later be examined in this civil action, it is apparent that the witness, good though his memory may be, cannot be expected to recall in detail the precise tenor of voluminous Grand Jury testimony given three years ago or

more. Moreover, conditions may have changed since the time of his Grand Jury testimony. Yet, unless Procter has access to the Grand Jury transcripts, plaintiff, which has had the transcripts available to it for years, may well charge various witnesses with inconsistent statements, apparent or even real, thus involving the witness in the disadvantage of making explanations of an honest mistake or a lapse of memory or a change of conditions. Plaintiff may, if the witness's present testimony is favorable to it, remain silent. It may, if his present recollection is unfavorable to plaintiff, attempt to impeach him.

We do not believe that the spirit or purpose of the Federal Rules condone such an inequity which places the plaintiff in a "head I win, tails you lose" position. For this reason and for the reasons stated in Procter's motion [fol. 2055] and supporting papers, we submit that the gross injustice of the preferred status now enjoyed by plaintiff should be removed by granting disclosure to Procter of the Grand Jury transcripts.

III. Procter is entitled to access to the transcripts of the grand jury testimony of all witnesses who consent to such disclosure.

In recent years, increasing recognition has been accorded the need for a solution, particularly in antitrust cases, of the problem of equalizing the inequities inherent in the situation where the Government can utilize the Grand Jury process to prepare civil cases, while the defendants are denied access to Grand Jury materials (see, e.g., Report of Attorney General's National Committee to Study the Antitrust Laws [1955] 345). As will be observed hereinafter, recognition of the problem has been accompanied by judicial efforts to afford relief to defendants seeking to remove at least some of the unfair advantages of the Government. This case, where the inequities are so striking, offers, we submit, an opportunity for a clear-cut solution of the problem—a solution which is entirely in accord with law and principle but which nevertheless has need of a convincing enunciation.

Procter contends that it is entitled to all of the Grand [fol. 2056] Jury testimony. It nevertheless points out that additional authority establishes beyond doubt that access

should be granted at least to the Grand Jury testimony of those witnesses who consent to the disclosure. *United States* v. *Standard Oil of California, et al.*, No. 11584-C, S.D. Calif., Central Div., Pre-trial Memorandum No. 1 filed July 6, 1955; *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 630; *In re Bullock*, D.C.D.C., 103 F. Supp. 639; VIII Wigmore on Evidence (3d ed.) 724.

The general principle is stated in VIII Wigmore on Evidence (3d ed.) 724, where it is said:

> "The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the *privilege* must therefore be *that of the witness*, and rests upon his consent." (Emphasis the author's.)

The principle was alluded to in *In re Bullock*, D.C.D.C., 103 F. Supp. 639, where Judge Kirkland, pursuant to his discretionary power under Criminal Rule 6 (e), granted access to the Commissioners of the District of Columbia of the Grand Jury testimony of a non-consenting witness.* [fol. 2057] That the court was aware of the decisive effect of consent to disclosure is demonstrated by its prefatory statement to the effect that (p. 641):

> "Since the respondent declined voluntarily to consent to the disclosure of the Grand Jury minutes, this opinion will be concerned with the Court's power under the first part of Criminal Rule 6 (e)."

This Circuit, in the recent case of *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, has recognized that consent of the

---

* Parenthetically, we might note that plaintiff, in its discussion in the *Bullock* case (Brief, p. 8), apparently continues to assume that the Government, as a litigant, is in some privileged or superior position. Thus, plaintiff says that the Bullock case was one "where the public interest in disclosure, as opposed to the wishes of a private litigant, was determined to be paramount to the policy of secrecy." Presumably plaintiff would have it inferred that the "wishes of a private litigant" can never be a matter of "public interest". No argument, of course, is needed to show that the Government should be in no better position in this case than a private party and should be held to the same standards of fairness.

witness to disclosure of his testimony removes any obstacle to the granting of access. Although the case involved alleged perjury before the Grand Jury, Judge Kalodner, after referring to the reasons traditionally given for preserving secrecy, went on to assert (p. 630):

> "Since all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings." (Emphasis the court's.)

[fol. 2058] None of the five traditional reasons for Grand Jury secrecy referred to by Judge Kalodner are applicable where, as in this case, the Grand Jury was discharged over three years ago without returning an indictment against any of the present defendants and where, as here, the plaintiff itself publicized the fact of the Grand Jury investigation. Any policy in favor of encouraging free disclosures by persons having information with respect to the commission of crimes can refer, at most, to a temporary secrecy. As Professor Wigmore says (VIII Wigmore on Evidence [3d ed.] 724-5):

> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges.
>
> . . . . . .
>
> "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:" (Emphasis the author's.)

Clearly, this must be so. The Grand Jury witness himself is under no obligation of secrecy, his deposition may be taken in the civil case by the defendants, he may be [fol. 2059] called to testify at the trial. Under these cir-

cumstances why, after discharge of the Grand Jury, should a record of what he said be obscured in secrecy? A policy to that end would do no more than encourage perjury. In addition, if the witness consents to disclosure, there can be, as Judge Kalodner says, no reason whatsoever to suppress his testimony.

The *Rose* decision also casts substantial doubt on the validity of *United States* v. *General Motors Corp.* D. Del., 15 F.R.D. 486, *supra*. Moreover, neither *General Motors* nor *Morgan* can apply with respect to witnesses who consent to disclosure of their Grand Jury testimony.

The rule of the Third Circuit was, within the past few months, applied in the District of California. In *United States* v. *Standard Oil of California et al.*, No. 11584-C, S. D. Calif., Central Div., the defendants filed interrogatories asking, among other things, for identification of Grand Jury witnesses. The purpose of the interrogatories was preparation for a subsequent motion to produce the transcripts. Judge James M. Carter dealt with the problem as though an application had actually been made for [fol. 2060] the transcripts and, in this regard, stated (Pre-trial Memorandum No. 1, filed July 6, 1955, p. 2-3):

> "There are valid reasons why grand jury transcripts should not be made public. The citizen should be permitted to testify without fear that his testimony will be made public. This objective is served if the witness is given the right to determine if his testimony shall be thereafter made public. No bars however can come in this case, from supplying the defendants with the names of those testifying before the grand jury.
>
> "The court proposes:—
>
> "1. That the plaintiff supply the name and identification of all witnesses appearing before the 1947-1948 grand jury, except 'informers' as hereafter discussed. The 'in camera' report shows a total of 42 witnesses; 17 *were then* officers or employees of defendants, and supply the name and identification of each witness appearing before the 1939 grand jury, which plaintiff proposes to use at the trial of the action. The 'in

camera" report shows 7 of such witnesses at the 1939 session.

"2. That if the written consent of a witness be obtained, a copy of the transcript of such witness's testimony be supplied the defendants. If such witness consents, then obviously there is no informer privilege to be protected. This would probably make available all the transcripts of the executives and officers of defendant corporations.

"The consent of each witness should only be obtained by addressing a letter to him, asking for consent, and enclosing a form on which the consent may be en- [fol. 2061] dorsed. The letter and form of consent should be approved by the court.

"The defendants should undertake the obtaining of the consents."

In its Answer of November 8, 1955, to Procter's motion objecting to the taking of Mr. Siddall's deposition, plaintiff asserts in effect (p. 10-11) that even though Judge Carter stated that the Grand Jury testimony of consenting witnesses should be supplied to the defendant, the Government has not acquiesced. We do not see that plaintiff's remark calls for an answer.

To implement his ruling, Judge Carter stated (p. 3) that the Government should submit to the court, in camera, the names of the Grand Jury witnesses whom the Government considered to be "informers" who were not to be called as witnesses at the trial, together with the reasons who they should be considered informers. Apparently, Judge Carter was prepared to confine "informers" to one who "voluntarily" supplied information "under an assurance, expressed or at least implied, that his identity is not to be revealed." (p. 6)

If this Court should determine upon a similar program, [fol. 2062] and if plaintiff should assert an informer's privilege as to any of the Grand Jury witnesses, Procter respectfully requests an opportunity to be heard for the purpose of establishing that none of such witnesses may properly be classified as informers, as well as for any other purposes which may be pertinent.

The cases above discussed plainly establish that Procter is entitled, at the very least, to have access to the tran-

scripts of the Grand Jury testimony of those witnesses who consent to disclosure. It is anticipated that consents can readily be obtained from most, if not all, of the Grand Jury witnesses. Procter offers to join in any program designed by the Court to accomplish the obtaining of such consents.

Conclusion

Preferably, this Court should order plaintiff to make available to Procter for inspection and copying the transcripts of the testimony of all Grand Jury witnesses. At the least, we submit that the Court should order plaintiff to identify all Grand Jury witnesses and, as to consenting witnesses, order plaintiff to make available to Procter for [fol. 2063-2064] inspection and copying the transcripts of their testimony. In the event the latter course is pursued, it is suggested that a decision on the motion for access to all Grand Jury testimony be deferred until it is determined to what extent the witnesses have consented.

November 28, 1955.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By John A. Ackerman, 810 Broad Street, Newark, New Jersey. Richard W. Barrett, per H.A.L. Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio. Kenneth C. Royall, per H.A.L. Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for defendant, The Procter & Gamble Company.

[fol. 2064a] Service is hereby acknowledged this 28th day of November, 1955.

Raymond Del Tufo, Jr., United States Attorney. By George J. Rossi, Assistant.

[File endorsement omitted]

[fol. 2065] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

BRIEF OF LEVER BROTHERS COMPANY IN SUPPORT OF ITS MOTION TO INSPECT AND COPY TESTIMONY OF WITNESSES BEFORE THE GRAND JURY—November 28, 1955

INTRODUCTION

Prior to the institution of the present civil proceedings by the United States, the Government conducted a prolonged grand jury investigation extending over a period of 18 months from May 1951 until November 1952. The term of the grand jury expired without indictment and the instant civil suit was filed on December 11, 1952.

In the spring of 1953, the defendants requested the Government to make available to them all documents obtained by the Government from various third parties pursuant to grand jury process. The defendants predicated this demand upon the terms of Rules 16 and 17 of the Federal Rules of Criminal Procedure as interpreted by the Supreme Court in *Bowman Dairy Co.* v. *United States*, 341 U.S. 315, 71 S. Ct. 676. This case holds that in the new Rules of Criminal Procedure "*there was no* [fol. 2066] *intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial*". (Emphasis added). In recognition of this principle, the Government consented to the entry of an order of this court dated June 15, 1953, which permitted the defendants to inspect and copy documents or copies of documents which the United States had obtained by grand jury process from 37 persons, firms or corporations, who, upon request, had consented to the inspection of their documents by the defendants.[1]

[1] No effort was made at that time to inspect the documents of any person unwilling to consent to such inspection out of deference to the Government's view that such inspection would require a court order after an opportunity for the interested parties to be heard. Defendants have deferred presenting this problem to the court, pursuant to the agreed order of procedure, until after the plaintiff has completed its discovery.

On October 17, Lever Brothers wrote the Assistant Attorney General, Stanley M. Barnes, of its need in the preparation of its case of access to the transcript of testimony of witnesses appearing before the grand jury, and suggested that the same policy be adopted with respect to the testimony of such witnesses as had been adopted in July of 1953 with respect to the documents produced before the grand jury by such witnesses, namely, that Lever be given access to the grand jury testimony of witnesses who consented thereto.

On November 2, the Assistant Attorney General informed counsel for Lever Brothers that the Government did not regard the action of this court of July 16, 1953, respecting the disclosure of documents produced before the grand jury, as any precedent for disclosure of the [fol. 2067] testimony of witnesses appearing before that body. He declined to consent to the disclosure of the grand jury testimony of the witnesses.

Accordingly, Lever Brothers Company has filed a motion in this court to permit the inspection and copying of those portions of the grand jury transcript which set forth the testimony of witnesses appearing before the grand jury, or, in the alternative, for such portions of the transcript as set forth the testimony of such witnesses as consent to the disclosure of their grand jury testimony. The grounds for this motion are: (1) that no privilege of secrecy attaches to the testimony of a witness before the grand jury; (2) that Lever Brothers is urgently in need of access to such testimony in order to discover in this civil proceeding the evidentiary basis, if any, for the charges in the Government's complaint and to prepare its defenses to such charges; and (3) that if Lever Brothers seeks to obtain discovery of the witness' testimony through depositions pursuant to the Federal Rules of Civil Procedure, this process will necessarily involve substantial cost and severe inconvenience to all parties, will gravely retard the expeditious preparation of this cause for trial, and will not in any event produce accurate information as to the witnesses' testimony because of the lapse of time and other factors.

Summary of Argument

From the earliest times, the law has maintained a sharp distinction between the secrecy that attaches to the deliberation of the grand jurors and that which attaches to the testimony of witnesses. Indeed, it was the late [fol. 2068] Seventeenth Century before even the right of the grand jurors themselves to be secure in their deliberations was finally established. As to the witnesses before a grand jury, with sporadic exceptions, wherever the tradition of the common law has prevailed, it has been recognized that they have at best, only a temporary privilege against disclosure, existing until the grand jury has finished its proceedings. Even for the temporary period when it existed at all, the privilege was that of the witness, to be waived in his sole discretion. This distinction between the secrecy surrounding the deliberations of the grand jury and the limited privilege accorded witnesses appearing before it has now been codified in Rule 6(e) of the Federal Rules of Criminal Procedure, which forbids the imposition of an oath of secrecy on a witness.

By far the greater number of the cases involving the secrecy of grand jury proceedings have arisen in criminal matters where an attempt was being made to quash the indictment on the ground that sufficient evidence was not present to establish probable cause. In short, the question has ordinarily been engendered by an effort of an accused to cause the judge to substitute his judgment for that of the grand jury as to the existence of grounds for indictment. These efforts have uniformly met with rebuff. It was in this context that the oft-quoted remarks of Judge Learned Hand in the *Garsson* case were uttered, to repudiate once and for all the notion that a district judge should assume the functions of a grand jury.

An uncritical application of Judge Hand's remarks, so salutary in their own setting, to other and unrelated contexts, can result in considerable mischief. Indeed, in [fol. 2069] at least two recent cases, Judge Hand, himself, participated in rebuffs administered by the Court of Appeals for the Second Circuit to District Courts for refusing in proper cases to make available to defendants in criminal

cases grand jury testimony. Thus, even in criminal cases and even as to the oath of secrecy of the grand juror, himself, the rule of secrecy has never been absolute. It has always been recognized that, as Mr. Justice Douglas observed in the *Socony-Vacuum* case, "After the grand jury functions are ended, disclosure is wholly proper where the ends of justice require it."

In the instant case, no attack is being made on the grand jury proceedings and no attempt to breach the limited secrecy that surrounds the deliberations of the grand jury is involved. Rather, access is here sought only to the testimony of witnesses and only in an effort to discover relevant facts in a subsequent civil proceeding. Here, the grand jury proceeding as such is not involved. The interest of the defendant is solely to obtain access to evidentiary material which is available to the plaintiff and to which the defendant is entitled within the letter and spirit of Rule 33 of the Rules of Civil Procedure. The fact that this material is in the form of witness' testimony before a grand jury rather than in depositions is due entirely to the plaintiff's choice of the grand jury as a discovery instrument.

Had the Government conducted its discovery in this case by deposition, the present problem would not have arisen. It is conceded by all that the defendants can now proceed to take the depositions of all witnesses before the grand jury and freely inquire into their testimony before [fol. 2070] that body. It follows that the objection now advanced by the Government to disclosing the witnesses' grand jury testimony is one of form and not of substance. In effect, the Government concedes that the witness on civil deposition may be asked to recall his grand jury testimony of three to four years ago. However, the Government contends that the witness' recollection may not be refreshed by the grand jury record of what he said over three to four years ago. But such an argument confuses the whole notion of privilege: if the witness, as distinct from a juryman, has any privilege at all, that privilege must go to his testimony, not to the recordation of it. As Judge Hough, in a statement cited with approval by the Supreme Court in the *Socony-Vacuum* case, once ob-

served for a Court of Appeals panel of which Judge Learned Hand was a member:

> "The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection."

Further, the present case presents to the Court only the extremely narrow question of access to such testimony in subsequent civil antitrust litigation where the Government has had prior resort to a grand jury for what, in effect, is civil discovery. Such cases are comparatively rare and present almost unique circumstances for the accommodation of the broad purposes of civil discovery to the limited policy of secrecy in criminal procedure. To hold that evidence in a civil antitrust case, taken in the form of grand jury testimony, shall be available for discovery under the civil rules involves none of the policy considerations which arise in a criminal proceeding. It is merely to hold that in a civil antitrust case both the Government and the defendants shall be governed by the same Rules [fol. 2071] of Civil Procedure. Fair play between the parties would seem to require no less.

In the circumstances here, then, no rule of law or logic militates against the disclosure of the witness' grand jury testimony. The alternative to such a practicable and expeditious discovery of the evidence in this civil proceeding is a prolonged series of depositions all over the country at untold expense in time and money to the court, the Government and the defendants. Such a result can only operate to defeat rather than serve "the ends of justice" by putting the parties to unnecessary expense and by unduly delaying the trial of this cause.

I. History of Grand Jury Oath of Secrecy Reflects Sharp Distinction Between Jurors and Witnesses.

There seems little doubt that at common law no obligation or oath of secrecy was ever imposed on witnesses before a grand jury. Indeed, in a day and age when grand and petite jurors alike were qualified by their knowledge rather than their ignorance of the facts, even the grand jurors, themselves, were not sworn to secrecy. Thus, in Bracton's time (c. 1258) the oath administered to grand

jurors contained no undertaking of secrecy at all (*Bracton De Legibus Angliae, Twiss's Ed.*, pp. 239-241). By the time of Lambard, however, (c. 1571) it was the general practice to administer an oath of secrecy to grand jurors in substantially the modern form (*Lambard Eirenarcha* (1588) p. 397), although Wigmore cites the *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 771 (1681) as the last attempt by a court to require that grand jury proceedings be held in public. Wigmore, *Evidence* (3 Ed.) § 2360.

[fol. 2072] To witnesses, on the other hand, no oath of secrecy was ever administered at common law. The earliest form of the oaths administered to grand jurors and to witnesses, respectively, which have come down to us, are to be found in the Book of Oaths. They are (1688 Ed., pp. 113-115):

"*The Oath of the Great Inquest*

"Ye shall truly enquire, and due presentment make of all such things as you are charged withall on the Queens behalf, *the Queens Council, your own, and your fellows, you shall well and truly keep*; and in all other things the truth present. So help you God, and by the Contents of this Book. (Emphasis supplied)

"*The Oath of those that give Evidence Upon Bills of Indictment*

"The Evidence that you shall give to the Inquest, upon this Bill shall be the truth. And you shall not let so to do for malice, hatred, or evil will, nor for meed, dread, favour or affection. So help you God, and the Holy Contents of this Book."

This striking difference between the oath taken by a juror, who was admonished to keep his own and his fellows' council—that is, to keep their deliberations confidential—and that taken by a witness who was under no injunction "to hold his tongue" clearly discloses that no obligation of secrecy was ever imposed upon witnesses. Subsequent cases extended the juror's obligation to secrecy to persons who assisted the grand jury in the administration of justice, such as the clerk and the prosecutor. *Hale*, Pleas of the Crown (1736), Vol. 2, p. 161. But no

substantial English authority exists for the proposition that an oath of secrecy could ever be imposed on a witness. This distinction, recognized so clearly by the English common law, has become thoroughly established in the common law of a majority of the states in which the question has [fol. 2073] arisen. *People* v. *Young*, 31 Cal. 563 (1867); *People* v. *Haughton*, 38 How. Pr. 430 (1870); *Little* v. *Comm.*, 66 Va. 921 (1874); *Burns Detective Agency* v. *Holt*, 138 Minn. 165, 164 N. W. 590 (1917); *State* v. *Fish*, 90 N. J.L. 17, 100 Atl. 181 (1917); *State* v. *Borg*, 150 Atl. 189 (N. J. 1930).

The same distinction has been recognized in the Federal Courts. *United States* v. *Amazon Corp.*, 55 F. 2d 254, D. C. Md. (1931), and cases cited. As Judge Coleman observed in the latter case, after examining the history of the secrecy of grand jury proceedings in England and America, at p. 264:

> "It is significant in this connection to note that witnesses before federal grand juries are not sworn to secrecy."

This historic distinction between the role of the grand juror and that of a witness before the grand jury has now been codified in the Federal Rules of Criminal Procedure. Rule 6(e), while imposing temporary and limited secrecy on the jurors, attorneys, and stenographer, specifically forbids the administration of an oath of secrecy to a witness by providing:

> "No obligation of secrecy may be imposed upon any persons except in accordance with this rule."

The Advisory Committee's Note on Rule 6(e) states:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

See also Dession, *The New Federal Rules of Criminal Procedure: II*, 56 Yale L. J. 197, 203-204 (1947), giving same interpretation to Rule 6(e).

[fol. 2074] II. Even the Grand Juror's Oath Imposes Only a Limited Obligation of Secrecy Which May Be Lifted Whenever the Interests of Justice Require.

The reasons for the limited rule of secrecy attaching to the Grand Jury's deliberation are set forth in the much-cited opinion of Judge Coleman in *United States* v. *Amazon Corp., supra*, recently given new currency in this Circuit in *United States* v. *Rose*, 215 F. 2d 617, 628 (C. A. 3, 1954), where the Court of Appeals required that a defendant accused of perjury be shown his grand jury testimony. The Court of Appeals restated the policy considerations underlying grand jury secrecy as:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevents persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tempering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial when there was no probability of guilt."

While the deliberations of the grand jury have been protected down through the years by the grand juror's oath of secrecy, however, all courts have always recognized that even the grand juror's oath of secrecy could not be pressed to the point where it defeated the very ends of justice which it was meant to serve. Accordingly, it has been uniformly recognized that after the grand jury has performed its duties and the reason for the rule of secrecy has ceased, the rule itself becomes inoperative. *Attorney* [fol. 2075] *General* v. *Pelletier*, 240 Mass. 264, 134 N. E. 406 (1922).

One of the earlist statements of the rule governing disclosure of grand jury testimony in the federal courts is

found in *United States* v. *Farrington*, 5 Fed. 343, 347 (D.C. N.D. N.Y. 1881), where District Judge Wallace said:

> "The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations, (*The People* v. *Shattuck*, 6 Abb. N.C. 34; *Commonwealth* v. *Mead*, 12 Gray 167,) because this cannot serve any of the purposes of justice." (5 Fed. p. 347).

Atwell v. *United States*, 162 Fed. 97 (C.C.A. 4, 1908) also contains a well known statement on disclosure of grand jury proceedings. The court held that in a proper case even a juror could disclose the testimony of witnesses:

> ". . . . The reason of the law is the life of the law, and this in a much stronger sense is true as to its policy. When once the reason for a policy to be pursued no longer exists, certainly the requirement to pursue that policy ends. It would not be required of grand jurors, we think, by any possible sound course of reasoning, after indictment found, trial and conviction had, judgment rendered, and penalty suffered, to refrain from ever discussing or mentioning to any one the testimony adduced on trial, solely because it had been first adduced before them in the grand jury room. * * * What reason, therefore, can exist why the grand jurors, under such conditions, should be bound to secrecy? We can see none; and for these reasons we hold this fourth obligation of the grand juror's oath to require secrecy only so long as the policy of the law requires, and that that policy does not require it, so far as the evidence adduced before the grand jury is concerned, after presentment and indictment found, made public, and custody of [fol. 2076] the accused had, and the grand jury finally discharged." 162 Fed. 99-100, 101.

In *Metzler* v. *United States*, 64 F. 2d 203 (C.A. 9, 1933) the Ninth Circuit Court of Appeals also held that the secrecy which surrounds the grand jury's deliberation has but a temporary utility:

> "Where the ends of justice can be furthered thereby and when the reasons for secrecy no longer exist the policy of the law requires that the veil of secrecy be raised." (64 F. 2d at 206).

The rule was given authoritative statement, with citation of the *Metzler* case, in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, holding that grand jury testimony may properly be used to refresh witnesses' recollection. The Supreme Court said:

> ". . . Grand jury testimony is ordinarily confidential. See Wigmore, supra, § 2362.
>
> "But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. See Metzler v. United States, 9 Cir. 64 F. 2d 203, 206. . . ." 301 U. S. 233-234, 60 S. Ct. 849.

See also *In Re Bullock*, 103 F. Supp. 639 (D.C. D.C. 1952) and *Herzog* v. *United States*, 75 S. Ct. 349. In the *Herzog* case, Douglas, Circuit Justice, held that denying an accused's request to inspect a witness' testimony before a grand jury in order to impeach the witness raised a substantial question entitling a defendant to bail. To the same effect, see also *In Re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (D.C. E.D. Pa., 1933).

The cases just cited teach that even a grand juror's oath of secrecy will be lifted where appropriate to serve the ends of justice. Such cases are, of course, to be dis- [fol. 2077] tinguished from the host of cases[2] which hold

---

[2] These cases are largely collected in fn. 2A to the decision of Judge Leahy in *United States* v. *General Motors*, 15 F.R.D. 486 (D.C. Del., 1954), in which Judge Leahy would seem to have given too little consideration to the principle governing disclosure adopted by the Court of Appeals for the Third Circuit in *United States* v. *Rose*, *supra*.

that a District Court will not open a grand jury transcript in order to weigh whether the grand jury had probable cause to indict. The principle underlying cases of this type was tersely expressed in a much quoted statement of Judge Learned Hand in *United States* v. *Garsson*, 291 Fed. 647, 649 (D.C. S.D. N.Y. 1923). In that case Judge Hand, on a motion to quash, summarily repudiated the notion that a district judge could assume the function of a grand jury and undertake to determine from the evidence before that body whether probable cause existed.

Such a view is, of course, unexceptional, but that Judge Hand never expected his remarks in the context of a motion to quash to be uncritically applied to other circumstances is reflected by his own action in later cases. In *United States* v. *Remington*, 191 F. 2d 246, 250 (C.A. 2, 1951); cert. den., 343 U. S. 907, 72 S. Ct. 580 (1952), Judge Hand participated in a reversal of a conviction for perjury where the defendant was denied the right to inspect his grand jury testimony. Similarly, in *United States* v. *Alper*, 156 F. 2d 222 (C.A. 2, 1946), Judge Hand was a member of a panel which, in the course of reversing the District Court on other grounds, admonished the lower court to give careful consideration to the defendant's right to inspect grand jury testimony of witnesses for the purpose of impeaching them at his second trial.

[fol. 2078] III. Unlike Grand Juror, Witness Has Only Temporary Privilege of Secrecy and He May Waive It At Any Time.

While no oath of secrecy may be imposed upon a witness, he has traditionally been clothed with a temporary privilege of secrecy. The justification for such secrecy rests primarly upon the necessity for inducing witnesses to testify freely.

A. Witness Privilege Temporary

Wigmore explains that a witness' privilege is *temporary* and provisional. *Wigmore, Evidence*, (3rd Ed.) § 2360 and § 2361. It ends (1) when an indictment is returned on the witness' testimony or (2) when an indict-

ment is not returned. Wigmore explains this proposition as follows (§ 2362):

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. . . .
>
> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. . . .
>
> "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused."

B. Privilege May Be Waived By Witness

Wigmore also emphasizes that the secrecy of a witness' testimony is totally a matter of his privilege. He may waive it at any time (§ 2362):

> "The privilege, therefore, is not the grand juror's; for he is merely an indifferent mouthpiece of the disclosure. Nor is it entirely the State's; for the State's [fol. 2079] interest is merely the move for constituting the privilege. The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the *privilege* must therefore be *that of the witness*, and rests upon his consent."

If, as the criminal cases cited above indicate, even a juror's oath may be relaxed to obtain his version of a witness' testimony, the instant case affords a perfect illustration of the circumstance where the witness' own testimony may be disclosed. Here no attack is being made on the grand jury proceedings, this Court is not being importuned to reweigh probable cause, and no attempt is involved to breach the limited secrecy that surrounds the deliberations of the jury itself.

Rather, access is here sought only to the testimony of witnesses who were not, and could not, be sworn to secrecy. It is sought not to explore or attack the grand jury proceedings but only for the legitimate discovery of relevant facts in subsequent civil proceeding. The Government must concede that the testimony of the witnesses before the grand jury may be elicited on deposition in civil discovery proceedings. In essence, therefore, the Government is reduced to arguing that while a witness is under no obligation of secrecy and while his grand jury testimony may be discovered civilly, the best evidence of that testimony—the transcript—may not be discovered.

Such a position is utterly untenable. It hopelessly confuses the whole notion of privilege. If the witness, as distinct from a juryman, has any privilege at all, that privilege must go to his testimony, not the record of it. If he may disclose his testimony, what proposition of law or logic denies him access to the best evidence of that testimony. As Judge Hough, in a statement cited with approval by the Supreme Court in the *Socony-Vacuum* case, [fol. 2080] once observed in *Felder* v. *United States*, 9 F. 2d 872, 874 (C.A. 2, 1925) for a Court of Appeals Panel of which Judge Learned Hand was a member:

> "The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection."

IV. The Treatment Of Testimony Before Grand Juries Where The Question Arises In A Subsequent Civil Action Must Be Accommodated To Liberal Discovery Rules of Civil Procedure.

The right of access to grand jury testimony in a subsequent civil proceeding poses an extremely narrow question that arises only rarely. The question is confined almost exclusively to a handful of major antitrust cases where the Government has elected to do its civil discovery through the device of the grand jury. It may even be a question of only passing importance since the suggestion has seriously been renewed that the Government be authorized to employ some pre-complaint discovery tech-

nique.[3] But, in any event, the question here scarcely [fol. 2081] involves the serious policy considerations present in a criminal case.

Even in criminal cases, grand jury testimony may be disclosed, as the above authorities hold, where the interests of justice require. In applying this broad standard, it is exceedingly important to recognize the fundamental changes in policy effected by the adoption of new Federal Rules governing civil procedure. These rules greatly change prior law with respect to disclosure of facts in the hands of an opposing party. The "interests of justice" must not, therefore, be measured in terms of cases prior to the rules, but rather in accordance with the new policy that the rules embody. The instant case affords an almost perfect vehicle

---

[3] Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 345:

> "The last alternative is the grand jury. Its use where civil proceedings are contemplated from the outset cannot be justified on the purely formal ground that the Sherman Act defines a criminal offense appropriate for consideration by a grand jury, even though it may later be determined that equitable relief is more appropriate. In reality, resort to grand jury in essentially civil investigations stems from lack of an adequate civil discovery alternative.
>
> "We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.
>
> "We recognize that the Department has been handicapped and accept the Judicial Conference conclusion that present civil investigative machinery is inadequate for effective antitrust enforcement. The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails."

for a sensible accommodation of the principle that grand jury testimony will be disclosed when the "interests of justice" require with the liberal spirit that informs the Rules of Civil Procedure.

A. Policy of Criminal Rules

At the outset it must be recognized that even in criminal cases the law now reflects a liberal view towards disclosure of material presented to grand juries. Rules 16 and 17 of the Federal Rules of Criminal Procedure give defendants in federal criminal trials a large measure of disclosure for aid in trial preparation. Rule 16 is relatively limited in scope. Under it defendants may request disclosure of material "obtained from or belonging to the defendant" or "obtained from others by seizure or process." Rule 17(c) which permits a defendant to subpoena documents before trial provides much greater opportunities for disclosure. In *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 71 S. Ct. 675, a criminal case under the Sherman Act, the Supreme Court held that under Rule 17(c) the Government [fol. 2082] could be required to produce in advance of trial evidentiary material consisting of

> "'all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government preparation for trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; * * *'" (341 U.S. 217, 71 S. Ct. 677)

The Court said:

> "Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed ma-

terials. United States v. Maryland & Virginia Milk Producers Ass'n., D. C., 9 F.R.D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." (341 U.S. 220, 221, 71 S. Ct. 679).

The *Bowman* case was followed in *Fryer* v. *United States*, 207 F. 2d 134, 136 (C.A.D.C. 1953), where the Court of Appeals observed that "the Bowman view * * * leads to the fullest presentation of facts and away from the notion of a trial as a game of combat by surprise."

The Criminal Rules represent a very substantial change in outlook over prior days. Under common law, defendants in criminal trials were for the most part denied all types of disclosure and discovery. The reasons given to justify [fol. 2083] this policy were (1) the supposed likelihood of perjury and tampering with witnesses, and (2) the procedural "advantages" granted a defendant, making it difficult to obtain a conviction. See *Comment, Pre-Trial disclosure in Criminal Cases*, 60 Yale L. J. 626 (1951). These reasons, plainly rejected by the new Criminal Rules, are remarkably similar to some of those given for grand jury secrecy.

B. Civil Rules

What has been said in Part A above refers only to the spirit of disclosure that now prevails in criminal cases. But the present case is a civil proceeding. As such, it is subject to the sweeping policy in favor of disclosure promulgated by the Federal Rules of Civil Procedure. It is the purpose of the deposition and discovery rules in civil cases to reduce the elements of chance and guesswork in trials by giving each side a full opportunity to get all available facts. See Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 Col. L. Rev. 1179 (1938), Ragland,

Discovery Before Trial (1932). Consistently with this policy, it has been held that "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiry into the facts underlying his opponent's case." *Hickman* v. *Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392. The parties to a civil case have every right to "fish" for information in order to discover all relevant facts and all witnesses having knowledge of such facts.

C. Disclosure of Witnesses' Testimony Appropriate In This Case

The present motion is made in a civil proceeding governed by the standards and policies of the federal Civil Rules. Most cases involving grand jury secrecy have arisen in criminal trials—many of the leading ones before the [fol. 2084] liberalizing of criminal procedure under the federal Criminal Rules. Prior to the adoption of these rules the strong policy of the federal courts against giving an accused the right to know the evidence against him placed questions of disclosure of grand jury testimony in an utterly different context from that in which the present motion is made.

The governing rule is stated in terms of achieving substantial justice and this necessarily implies the making of decisions which will give effect either to the policy of disclosure or to that of non-disclosure, depending upon which is strongest in the light of justice. Here the reasons favoring continued grand jury secrecy are exceptionally weak.

The grand jury's term expired over three years ago without indictment. There is no danger that any defendant will escape. Deliberations of the jury—as distinguished from the testimony before it—are not sought. Protection of the innocent is not involved. The danger of perjury or tampering with witnesses is no greater than in any other civil case where pretrial disclosure is permitted. The free and untrammeled disclosure by persons having information of crimes can scarcely be discouraged after a lapse of three years.

In contrast to this absence of any sound reason refusing to disclose the grand jury testimony is the policy governing every civil case—that all evidence known to one side should be available to the other. Moreover, there is nothing to prevent the defendants from taking the depositions of all

persons having knowledge of the case, including all witnesses who testified before the grand jury. These witnesses could be asked to state everything that they could recollect having testified to before the grand jury. Necessarily, their recollection is bound to be faulty after a lapse of three years. [fol. 2085] It is submitted that the witnesses should not be subjected to the risk of perjury nor the defendants to the risk of partial information or misinforming when a record of the information possessed by such witnesses is readily available.

The Government, of course, will not assert that the purpose of investing the grand jury with an aura of secrecy is to suborn perjury. If a witness on civil deposition may be compelled to disclose his grand jury testimony, it is difficult to see what end of justice could possibly be served by exposing him to a contradiction to his grand jury testimony.

This seems particularly true where the Government has, itself, used the device of the grand jury to discover its own civil evidence and where it presumably intends to use such evidence at the trial. The Government will use the grand jury transcript at the trial to refresh or impeach as the occasion demands. Meanwhile, even the nature of such testimony is concealed from the defendants.

Such a procedure, even though it may occur only in a handful of antitrust cases, perverts the legitimate functions of the grand jury and defeats utterly the policy of complete disclosure commanded by the Rules of Civil Procedure. Those rules contemplate that in a civil case the Government shall be treated like any other litigant, that it shall no more be entitled to throw a cloak of secrecy around relevant facts than any other party.

The Government should not be permitted to avoid the "fair play" commanded by the Civil Rules by the evasive device of conducting its investigation through a grand jury. Surely under these circumstances any policy favoring grand jury secrecy should yield to the policy of the Civil Rules.

[fol. 2086] V. No Public Policy Forbids Disclosure Of Testimony Where Witness Consents.

It is submitted that a witness' privilege is, at best, temporary, and, whether he consents or not, his testimony

may be disclosed in "the interests of justice." However, it seems perfectly obvious that where a witness consents to the disclosure of his testimony no question of public policy is involved at all. As the Court of Appeals for this circuit announced in *United States* v. *Rose*, *supra*, p. 630:

> "Since all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings." (Emphasis the court's.)

It was in deference to this principle that Judge Carter in *United States* v. *Standard Oil Co. of California*, No. 11584-C, S.D. Calif., Central Div., Pre-Trial Memorandum No. 1, July 6, 1955, recently ordered the disclosure of the testimony of witnesses who consented in circumstances precisely similar to those here.

Conclusion

Should the present motion be denied it will place an immense burden upon the parties to this action and upon the Court. Wasteful and duplicitous deposition discovery proceedings will follow. Their net result will not differ materially from the results sought to be achieved by the present motion, but the orderly preparation of this case [fols. 2087-2088] for trial will be severely prejudiced. Under these circumstances the requirements of "substantial justice" require the granting of this motion.

Respectfully submitted, Bailey, Schenck & Bennett. by Alexander T. Schenck, 744 Broad Street, Newark, New Jersey. Arnold Fortas & Porter, by Mr. Fortas, 1229-19th Street, N. W., Washington, D. C., Attorneys for Defendant, Lever Brothers Company.

Dated: November 28, 1955.

Certificate of Service (omitted in printing)

[fols. 2088a-2089] [File endorsement omitted]

[fol. 2090] In United States District Court for the District of New Jersey

[Title omitted]

Memorandum in Support of Motion by Colgate-Palmolive Company for Disclosure of Testimony before the Grand Jury—November 28, 1955.

O'Mara, Schumann, Davis & Lynch, No. 1 Exchange Place, Jersey City 2, New Jersey. Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York, Attorneys for Defendant, Colgate-Palmolive Company.

Of Counsel: Mathias F. Correa, Jerrold G. Van Cise, James B. Henry, Jr.

[fol. 2091] Index

		Page
Table of Cases and Authorities		469,470
Summary of Facts		471
Point I	— The defendants are entitled to inspect and copy the grand jury testimony in the absence of considerations of secrecy	472
Point II	— The policy for secrecy of grand jury proceedings is inapplicable in the present circumstances	474
A.	Disclosure rests in the discretion of the Court	474
B.	The reasons traditionally assigned for secrecy are inapplicable here	475
C.	No privilege or secrecy on behalf of witnesses now exists; nor is secrecy possible in the present civil action	477
D.	The plaintiff called the grand jury witnesses for the purpose of discovery relating to the present civil action	479
E.	The plaintiff has used testimony before the grand jury in preparation of the present civil action	485
F.	The plaintiff has no claim of privilege with respect to the grand jury testimony	486
Point III	— Under the applicable decisions disclosure should be granted	487
A.	Criminal cases allow disclosure as justice requires; cases involving attacks on the sufficiency of indictments are inapplicable	487
B.	To refuse disclosure would be contrary to the rationale of *Bowman Dairy Co. v. United States*	493
C.	Those civil cases which deny access to grand jury testimony should not be followed	495

Page

[fol. 2092]

Point IV — As a minimum, disclosure should be granted as to those witnesses who consent 499

A. Consent of the witness is a recognized basis for disclosure of testimony 499

B. Disclosure of consenting witnesses' testimony would continue the procedure already in operation for documents 501

Conclusion 502

[fol. 2093] Table of Cases and Authorities

Cases:

Atwell v. *United States*, 162 Fed. 97 (4th Cir. 1908) 489

Bowman Dairy Co. v. *United States*, 341 U.S. 214 (1951) 493, 499

In re *Bullock*, 103 F. Supp. 639 (D.D.C. 1952) 492

In re *Grand Jury Proceedings*, 4 F. Supp. 283 (E.D.Pa. 1933) 495

Herzog v. *United States*, 75 Sup. Ct. 349 (1955) 492

Hickman v. *Taylor*, 329 U.S. 495 (1947) 472, 474

Metzler v. *United States*, 64 F.2d 203 (9th Cir. 1933), 489, 497

United States v. *Alper*, 156 F.2d 222 (2d Cir. 1946), 490, 492

United States v. *Byoir*, 147 F.2d 336 (5th Cir. 1945) 490

United States v. *Cohen*, 145 F.2d 82 (2d Cir. 1945), *cert. denied*, 323 U.S. 799 (1945) 497

United States v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D.La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950) 485

United States v. *Garsson*, 291 Fed. 646 (S.D.N.Y. 1923) 487

United States v. *General Motors Corp.*, 15 F.R.D. 486 (D.Del. 1954) 496, 499, 501

United States v. *Morgan*, Civil 43-757 (S.D.N.Y. Dec. 8, 1948) 496, 498, 499, 501

Page

[fol. 2094] *United States* v. *Owen*, 11 F.R.D. 371 (W.D.Mo. 1951) 497

United States v. *Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952) 491

United States v. *Rose*, 215 F.2d 617 (3d Cir. 1954), 475, 484, 487, 491, 498, 500

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 489

United States v. *Standard Oil Co. of California*, No. 11584-C (S.D.Cal. July 6, 1955) 500

United States v. *Violon*, 173 Fed. 501 (C.C.S.D.N.Y. 1909) 487

United States v. *White*, 104 F.Supp. 120 (D.N.J. 1952) 491, 497

United States v. *Wolrich*, 127 F.Supp. 215 (S.D.N.Y. 1955) 493

Other Authorities:

Rule 6(e), Federal Rules of Criminal Procedure, 474, 478, 488, 492, 500

Report of the Judicial Conference, 13 F.R.D. 62 (Sept. 26, 1951) 499

8 Wigmore, *Evidence* §§ 2360-63 (3d ed. 1940) 476, 500

[fol. 2095] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

UNITED STATES OF AMERICA, Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, Lever Brothers Company and The Association of American Soap and Glycerine Producers, Inc., Defendants

MEMORANDUM IN SUPPORT OF MOTION BY COLGATE-PALMOLIVE COMPANY FOR DISCLOSURE OF TESTIMONY BEFORE THE GRAND JURY

Summary of Facts

A grand jury was summoned by this Court in May, 1951, and it sat for the full permissible period of 18 months until discharged on November 25, 1952. On December 11, 1952 the present complaint was filed.

During its term there were submitted to that grand jury by the present defendants pursuant to subpoenas large numbers of documents. Most of these documents were produced during the year 1951. In addition, vast quantities of documents were secured by the attorneys for the Government from other companies and individuals, by subpoena [fol. 2096] or otherwise. On May 15, 1953 there was submitted in the present action Plaintiff's General List No. 1, identifying by name all non-defendants whose documents or copies thereof had been in the possession of the plaintiff's trial staff. This list contained a total of 82 companies and individuals.

In addition, a number of witnesses appeared before the grand jury. The defendants are aware of the identity of 28 of these witnesses, who may constitute most of those called. Of these, 27 testified during the period from June 16, 1952 through November 18, 1952. The 28 witnesses had the following positions: current officers and employees of the present defendants at the time of their testimony, 9; former officers and employees of the present defendants, 9;

representatives of grocery chain stores, 2; representatives of oil and chemical companies, 2; representative of a meat packer, 1; representative of a tallow broker, 1; representatives of a fats and oils trade journal, 2; representative of a market survey organization, 1; representative of a supplier-competitor, 1.

All of the non-defendant enterprises of which these witnesses were representatives submitted files during the grand jury proceeding and appeared on Plaintiff's General List No. 1 with the exception of the two grocery chain stores.

One of the witnesses, Mr. James A. Reilly, who at the time of his testimony on November 6, 1952 was executive [fol. 2097] vice-president of Colgate-Palmolive Company in charge of soap sales, has subsequently died.

The question presented by the present motion is whether the defendant Colgate-Palmolive Company should be granted the right to inspect and copy the transcript of the testimony of the witnesses before the grand jury.

Point I

The defendants are entitled to inspect and copy the grand jury testimony in the absence of considerations of secrecy.

Certainly if the testimony of this nature were simply sitting in the plaintiff's files, it would be properly subject to production under Rule 34 as documents not privileged, upon a showing of good cause. Thus the Supreme Court has said in *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947):

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual

---

[8] "One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

[fol. 2698] With specific reference to statements of witnesses, the Court said:

"We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition, discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning." (329 U. S. 511-2)

The grand jury investigation was coextensive with the complaint subsequently filed. This is shown by a mere inspection of the grand jury subpoenas, by the occupations of the witnesses mentioned above and by the statement of the plaintiff's attorneys that their motion dated August 20, 1954 for additional documents was designed to secure material "supplementary" to that secured by grand jury subpoenas. The affidavit of Joseph E. McDowell sworn to August 20, 1954 in support of the plaintiff's motion for production of Colgate documents states:

"With minor exceptions, all of these are either supplementary to documents and records previously fur-

> nished by the Company, or relate to matters with [fol. 2099] respect to which substantial information has already been furnished by the Company and the other defendants herein in the course of the investigation of the soap and synthetic detergent industry conducted by the Department of Justice prior to the institution of this action." (p. 3)

The reference to information other than documents can only be to testimony. There can be no doubt that this testimony is relevant and material, or that it falls within the description of the last quotation from *Hickman* v. *Taylor*.

In the absence, therefore, of the policy with regard to secrecy of grand jury proceedings set out in Rule 6(e), the defendants would be entitled to access to the testimony before the grand jury. The question is whether that policy is such as to foreclose access here.

Point II

The policy for secrecy of grand jury proceedings is inapplicable in the present circumstances.

A. Disclosure rests in the discretion of the Court

That the disclosure of grand jury testimony in connection with a judicial proceeding is in the discretion of the Court is established by Rule 6(e) of the Federal Rules of Criminal Procedure:

> "(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a [fol. 2100] juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule . . ."

In re *Bullock*, 103 F. Supp. 639 (D.D.C. 1952), shows how broad this discretion is. The decision dealt with an application by the Commissioners of the District of Columbia to inspect grand jury testimony to determine whether there had been dereliction of duty by a police inspector. Judge Kirkland allowed inspection of the inspector's own testimony, even though no "judicial proceeding" was pending, although not that of other witnesses, all competent testimony having been given at a previous criminal trial of the inspector. The opinion states:

> "If a literal interpretation of F.R.C.P. 6(e) were given it would appear that under the circumstances the Court has no authority to grant the petition before it. See United States v. Owen, D.C., 11 F.R.D. 371, 373. However, by way of interpretation the Federal Courts have extended their jurisdiction so that they may remove the seal of privacy from Grand Jury proceedings *when in the Court's discretion the furtherance of justice* requires it. (Italics supplied.) Metzler v. United States, 9 Cir. 64 F.2d 203; United States v. Alper, 2 Cir., 156 F.2d 222; United States v. Crolich, D.C., 101 F.Supp. 782." (103 F. Supp. 641)

Point III is devoted to a detailed analysis of the cases which establish this proposition. The Court said further:

> [fol. 2101] "In cases of this nature, the sole question to be resolved is which policy shall be served to bring about justice, the one requiring secrecy or the other permitting disclosure?" (103 F. Supp. 642)

This is the question addressed to the Court's discretion by the present motion.

B. The reasons traditionally assigned for secrecy are inapplicable here.

A recent authoritative statement of the traditional reasons assigned for grand jury secrecy appears in *United States* v. *Rose*, 215 F.2d 617 (3d Cir. 1954). There the Court said in an opinion by Judge Kalodner:

> "Grand Jury proceedings are traditionally secret.
> "In United States v. Amazon Industrial Chemical

Corp., D.C.Md. 1931, 55 F.2d 254, 261, the reasons generally given for this rule of secrecy were summarized as follows: (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

"As was to be expected, however, an exception to [fol. 2102] the rule developed when its strict application would defeat the ends of justice.

"In United States v. Socony-Vacuum Oil Co., 1940, 310 U.S. 150, 234, 60 S. Ct., 811, 849, 84 L. Ed. 1129, the Supreme Court, after stating 'Grand jury testimony is ordinarily confidential' declared 'But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.'" (215 F.2d 628-9)

Of the five reasons assigned for secrecy all but the fourth are patently inapplicable. This reason is: "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes." This reason will be discussed as Point II C.

To the same effect is the discussion of the history and basis for secrecy which occurs in §§ 2360-63 of 8 Wigmore, *Evidence* (3d ed. 1950). Wigmore finds that the only bases for privilege in subsequent testimony are the secrecy of vote and opinion of the grand jurors and the privilege of witnesses. Again only the latter could be applicable to the present motion, for we do not seek disclosure of any of the deliberations of the grand jury, but only of the testimony of the witnesses who appeared before it.

C. No privilege of secrecy on behalf of witnesses now exists; nor is secrecy possible in the present civil action.

Wigmore in § 2362 states the nature of the privilege for witnesses:

> [fol. 2103] "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The secrecy is the State's inducement for obtaining testimony.
>
> * * * * * * *
>
> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:
>
> * * * * * * *
>
> "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:
>
> * * * * * * *
>
> "Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the same reasons noted in par. (1), *supra*. Furthermore, in the other rare contingencies in which his testimony before the grand jury might become relevant (*post*, § 2363, par. 2), justice requires in any case that Doe should not be exempted from disclosure.
>
> "There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended*, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue.

> "This is, in effect, the law as generally accepted today. It is, however, not usually stated in such [fol. 2104] a broad form. The common phrase is that disclosure may be required '*whenever it becomes necessary in the course of justice.*' Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle."

Thus any privilege against disclosure of testimony which witnesses before the grand jury discharged three years ago may once have had has now expired. As Wigmore indicates, an assurance of permanent secrecy would go too far and create an opportunity for perjury without fear of detection.

This discussion is of the common law. The Federal Rules of Civil Procedure introduce an additional factor. Not only has any privilege which the grand jury witnesses may have had ceased; the liberal rules of deposition and discovery make secrecy impossible.

We could take the depositions of the witnesses whose names we know. By questioning each of them about each of the very broad issues of the complaint we could cover most or all of the subjects that could have been raised before the grand jury.

Indeed, we could put direct questions to those witnesses as to what their grand jury testimony was. As Wigmore states, the only privilege relating to their testimony was theirs, and that expired when the grand jury had finished its duties. Rule 6(e) confirms that there is no duty on the part of the witness not to disclose his testimony:

> [fol. 2105] "No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The Advisory Committee Note to this subdivision states:

> "The rule does not impose any obligation of secrecy on witnesses."

We could locate some or all of the witnesses whose names we do not know by a systematic canvass, through depositions or otherwise, of the various major elements of the industry, and particularly of those individuals and organizations named on Plaintiff's General List No. 1.

All of this would be expensive and time-consuming. It would harass the witnesses, who would have to testify three times, if ultimately called at the trial, at widely separated intervals without access to prior testimony.

More important, this procedure would be inadequate. Already the grand jury testimony is over three years old, and in that interval variations of recollection would surely arise. Also, before the grand jury the witnesses were without counsel and were being questioned under very different circumstances. The form of the testimony, and quit possibly the substance, would be different from what a deposition could produce.

Inadequate for discovery purposes though such depositions might be, however, they would be sufficient in scope to eliminate any substantial "secrecy" of the witnesses' testimony before the grand jury.

[fol. 2106] It is simply a fact that the institution of a civil proceeding, with its broad discovery rules, on the same subject matter as a grand jury investigation, eliminates both the need for secrecy of grand jury testimony and the possibility of it. To preserve the hollow shell, at great inconvenience to parties and witnesses, is not justified under present procedure. No one would benefit, apart from the strategic advantage to the plaintiff of having an extra set of testimony. The result would be restoration to the "big case" of the sporting philosophy of litigation which the Federal Rules of Civil Procedure were designed to eliminate, with the necessary corollary of making the big case even bigger.

D. The plaintiff called the grand jury witnesses for the purpose of discovery relating to the present civil action.

The plaintiff admittedly employed the grand jury in part as a discovery device for use in the present proceeding, as this Court has already found in the opinion of May 11, 1953:

> "Government's counsel stated in affidavit form that the purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act, 15 U.S.C.A. §§ 1-3, or any of them, or of any other Federal anti-trust laws, and,

second, determination as to what action should be taken to enforce those laws through criminal proceedings, civil proceedings or both. He further stated that the investigation and all proceedings incident to it, including the grand jury proceeding, were begun and carried on pursuant to and within instructions to accomplish those purposes." (14 F.R.D. 230, 233)

[fol. 2107] We make no contention that this use of the grand jury was improper. We do say that it is relevant as to what justice now requires.

Moreover, the motion which was disposed of in this opinion dealt with documents. The present motion deals with testimony. The facts as to that testimony lead to the belief that, whatever may have been true of the documentary discovery, some or all of the testimony was secured for the sole purpose of discovery for the present civil action, then in serious contemplation, rather than with any thought of securing an indictment. The issue is not the propriety of this procedure, but whether justice now requires that the civil defendants share in the information obtained.

On May 12, 1955 Hon. Stanley N. Barnes, presently Assistant Attorney General of the United States in charge of the Antitrust Division, appeared before the Special Antitrust Subcommittee of the Judiciary Committee of the House of Representatives. As reported in the official verbatim transcript published by the Bureau of National Affairs, Inc., he testified in part as follows:

"Finally, I suggest you may wish to consider means available to the Department for compelling production of data before a complaint has been filed in a civil procedure. At the present time in the investigation of civil matters, the Department must

"(a) depend upon the voluntary cooperation of [fol. 2108] those under investigation;

"(b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

"(c) make use of the grand jury.

"Those are alternatives.

"From this it seems clear that the sole means for compelling pre-complaint data in civil cases is the

grand jury. Some—and I refer to lawyers there primarily—have urged that such use of the grand jury constitutes an abuse of its processes.

"Mr. Maletz. Do you agree with that position, Judge?

"Mr. Barnes. I do not. And my reasons are:——?

"The Chairman. I am glad to hear you say that. Why? (p. 347)

* * * * * * * *

"Mr. Harkins. In that connection, under the Sherman Act, you can use a grand jury to get evidence solely for a Section 4 injunction proceeding, can you not? There is no abuse of using the court's process to convene a grand jury to secure evidence for you solely in a Section 4 proceeding?

"Mr. Barnes. No, I do not think there is any abuse of it." (p. 350)

The subject matter of these quotations, and the investigation of the Judiciary Committee, originated with the Report of the Attorney General's National Committee to Study the Antitrust Laws, dated March 31, 1955, of which Committee Judge Barnes was a co-chairman. That report contains a discussion based on the following statement:

[fol. 2109] "In the investigation of civil matters, on the other hand, the Department must:

"(a) depend upon the voluntary cooperation of those under investigation;

"(b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

"(c) make use of the grand jury.

"These procedures do not satisfy civil enforcement needs." (p. 344)

It is apparent from these statements that the Department of Justice feels free as a general matter to use a grand jury for the sole purpose of civil discovery.

With regard to the present action, however, plaintiff's attorneys have stated that the grand jury proceeding was not conducted purely for discovery with a view toward the

civil action. Although this may be so for the proceeding as a whole, it is perfectly apparent from the time sequence that the decision to proceed civilly rather than criminally must have been made some time before the termination of the proceeding. It is in theory possible that an indictment was requested but that the grand jury refused it. This is unlikely, however. On December 11, 1952, the day the complaint was filed, the Department of Justice issued a press release, as is its custom. This release contained two statements of interest here:

> [fol. 2110] "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings. (pp. 2-3)
>
> * * * * * * *
>
> "In view of these and other factors, further criminal prosecution of defendants would not be effective in achieving the objectives of the Sherman Act." (p. 4)

The latter statement is presumably intended to imply that no indictment was requested.

Some light as to when the decision not to proceed criminally must have been reached is cast by the address of Marcus A. Hollabaugh, Chief of the Special Litigation Section of the Antitrust Division, given April 1, 1954 and printed in the American Bar Association Section of Antitrust Law Proceedings at the Spring Meeting, Washington, D. C., April 1-2, 1954. Mr. Hollabaugh stated in part:

> "The Attorney General, in a discussion of Departmental policy, has stated that 'Criminal proceedings will be limited to the obvious form of per se illegality.' This means that the nature and circumstances of the violation determines the kind of proceeding instituted and the Division (acting under the Attorney General) has the responsibility of deciding which proceeding, civil or criminal, or both, is justified by the facts.
>
> "Since we in the Division are not 'prophetic, we cannot always know in the *early* stages of an inquiry as to which, if any, proceeding should be pursued. Generally speaking, the first point where we can make a final decision, based upon the facts, as to the appro-

priate proceeding, is after a file search of the subject companies." (p. 19; emphasis added)

The point of this statement is that the decision whether to proceed civilly or criminally depends upon *files*. That is [fol. 2111] also one point of the civil investigative demand procedure that Judge Barnes discussed before the Antitrust Subcommittee:

> "I might say before we leave that, that one of the things that concerns me is that the civil investigative demand does not provide an opportunity for a witness to be examined under oath. It merely requires the production of documents.
>
> "I have been informed by those who have had more experience than I, that that production of testimony under oath is not as essential as I would think it would be. But it seems to me that that is one of the matters that requires considerable study." (pp. 348-9)

Most of the files produced for the grand jury were produced during the year 1951. So far as we know, most of the witnesses were called subsequent to June 16, 1952. Thus at the time that the intensive examination of witnesses began the Government attorneys had had for five months or more the material necessary for them to decide whether to proceed civilly or criminally. It is reasonable to assume that by this time they had already decided to proceed civilly, and that they took testimony of witnesses solely for discovery in the civil action.

Certainly some of the witnesses were called solely for the latter purpose. For example, on November 18, 1952 Mr. E. H. Little, the president of Colgate (now chairman of the board), testified. On November 25, 1952 the grand jury was discharged. It strains credulity, and we doubt [fol. 2112] that the plaintiff's attorneys will say, that upon hearing the testimony of Mr. Little the attorneys for the Government then decided they did not have a criminal case and forthwith discontinued the grand jury proceeding (at the expiration of the term of the grand jury, to be sure).

Another quotation from the Report of the Attorney General's Committee has a bearing here. The Report

quotes the Assistant Attorney General in charge of the Antitrust Division as follows:

> "He has also informed us that before a criminal action is brought the following procedures are currently invoked:
>
> "In the first instance a recommendation is made by the attorney in charge of the particular investigation. If he is in the field, his recommendation is then reviewed by his field office chief. It is then reviewed by the appropriate litigation section chief in Washington. The section chief's decision is reviewed by the first or second assistant to the Assistant Attorney General and by the Assistant Attorney General. Review at the various levels is effected not only by oral conferences, but also by written memoranda of facts detailing the evidence against each proposed defendant." (p. 350)

It does not require an intimate acquaintance with federal administrative procedure to see that this sort of thing will take time. The grand jury's term expired on or about November 25, 1952. If the attorney in charge of the case for the Government were planning to recommend a criminal action, he would certainly have put himself in a position to do so well in advance of that date; or if he made such a [fol. 2113] recommendation he must have done so well ahead, and not on the basis of the testimony of witnesses called in the latter months of the term.

There is yet another bit of evidence. The complaint is long and, to state it mildly, comprehensive. It was filed two weeks and two days after the discharge of the grand jury, with Thanksgiving intervening. We doubt very much that it was drafted and approved during that interval, but suggest that it was in the works long before.

Thus, some or all of the witnesses were not called as "persons who have information with respect to the commission of crimes", in the language of *United States* v. *Rose*, whose "free and untrammeled disclosures" are to be encouraged. They were called as persons having information useful in a civil proceeding. For this reason alone, no secrecy should attach to their testimony, even as a technical matter. Justice requires that testimony secured for

the sole purpoes of use in a civil action should be made available to the defendants in that civil action.

E. The plaintiff has used testimony before the grand jury in preparation of the present civil action.

In any event, whatever the purpose in securing it, there can be no argument that testimony before the grand jury has been used by the plaintiff in its preparation of the [fol. 2114] present case. We are sure that plaintiff's attorneys will not say otherwise.

The tentative statements of issues are clearly based at least in part upon such testimony. As an example, tentative statement II B 4 re Advertising and Promotion, relating to "assurances" by Lever, could hardly fail to have come from this source.

The very fact that prior to the taking of any depositions, and apparently with no plans for taking any, the plaintiff's attorneys are in a position to prepare tentative statements of issues indicates, at least until the present, an intention on their part to stand pat on the ground jury testimony for oral discovery purposes.

We refer again, also, to Mr. McDowell's affidavit of August 20, 1954 discussed in Point I, on the supplementary nature of the material sought in the plaintiff's motion for production.

This one-sided discovery is a subversion of the Federal Rules of Civil Procedure. If the Government chooses to proceed in civil litigation it should be willing to proceed under the rules applicable to civil litigation. *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D.La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950), is an example of this philosophy. The case was a civil action under the Sherman Act, in the course of which the Government refused to submit to the Court for a [fol. 2115] ruling on privilege documents called for by a Rule 34 motion, including among other things reports of the Federal Bureau of Investigation. The lower court said:

> "* * * to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; * * *." (9 F.R.D. 720)

Accordingly the Court dismissed the cause for failure to comply with its order.

Here, where it is apparent that the plaintiff has used and will use the material in question, disclosure should not be denied on the basis of any plea of the plaintiff.

F. The plaintiff has no claim of privilege with respect to the grand jury testimony.

Unlike the situation in the *Cotton Valley Operators* case, the grand jury transcripts are not properly speaking documents in the possession, custody or control of the plaintiff, within the meaning of Rule 34. They are not documents as to which the plaintiff can claim a privilege, within the meaning of that rule. They do not contain state secrets, certainly. They are, rather, documents in the custody of this Court to which the plaintiff's attorneys have such access as Rule 6 of the Federal Rules of Criminal Procedure and this Court grant to them.

[fol. 2116] The plaintiff's attorneys do not appear here as agents of the court or of the grand jury or of the Government in the prosecution of crime. They appear as attorneys for a civil plaintiff with the advantage of private access to certain relevant material. The responsibility for the determination of the issue of secrecy is entirely based upon this Court by Rule 6(e), which places upon the plaintiff's attorneys merely the responsibility of making disclosure only when so directed by this Court. The plaintiff's attorneys cannot properly assume the role of advisors to the Court on this issue. As attorneys for a civil litigant, their arguments against disclosure necessarily boil down to this: that they have an advantage and they want to keep it.

The plaintiff's attorneys do not say, nor can they very well say, that they gave the witnesses who appeared before the grand jury assurance that their testimony would never be made public. Such an assurance would have been a usurpation of the function of this Court. It would also have embodied an incorrect statement of the law, as the following discussion shows. No claim of privilege by the plaintiff can arise from this source.

[fol. 2117] Point III

Under the applicable decisions disclosure should be granted.

A. Criminal cases allow disclosure as justice requires; cases involving attacks on the sufficiency of indictments are inapplicable.

There are a great many opinions in which a defendant in a criminal case has been denied access to the minutes of the grand jury that indicted him, when his purpose was to attack the indictment. The consideration here is obviously a practical one in the administration of justice and has nothing to do with the reasons for secrecy of grand jury proceedings, such as those discussed in *United States* v. *Rose* and other cases. If a defendant could raise the question easily that insufficient evidence had been presented to the grand jury for an indictment, the courts would have to try every case twice, once to determine the propriety of the indictment and again to determine guilt. The courts are certainly not going to undertake that burden, nor should they be asked to do so. As Judge Learned Hand points out in *United States* v. *Garsson*, 291 Fed. 646 (S.D.N.Y. 1923), the criminal accused has every advantage, and he does not require this one.

Some of the more extreme statements on the subject of non-access to grand jury minutes, in fact, stem directly from the forceful dicta of Judge Learned Hand in cases of [fol. 2118] sort. These appear occasionally in other types of cases, although there is no reason to suppose that Judge Hand intended these statements to apply to anything but attacks on the indictment.

Judge Hand's first decision on the subject is *United States* v. *Violon*, 173 Fed. 501 (C.C.S.D.N.Y. 1909). This is a one-paragraph opinion the tenor of which is shown by the first sentence:

> "I cannot satisfactorily speculate upon the evidence which must have been before the grand jury, nor will I either myself inspect, or permit another to inspect, its minutes."

It should be noted that the concept of secrecy does not enter into the opinion. The point made is this:

> "There is no precedent, as far as I can find, for such control of the grand jury, and I am the last who would initiate it."

The case most commonly cited is *United States* v. *Garsson*. This is quoted in full on the point in question, because it is important to show the kind of case it was and the philosophy behind it.

> "Finally, the defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible, move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. U. S. v. Violon (C.C.), 173 Fed. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment [fol. 2119] on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." (291 Fed. 649)

Again there is no allusion to secrecy. The objection is to being asked to second-guess the grand jury. Judge Hand thinks further that the accused should not "in advance have the whole evidence against him to pick over at his leisure." But this is the very right which the Federal Rules of Civil

Procedure give to the civil defendant. Nothing in this opinion has the least bearing on obtaining for discovery purposes in a civil action testimony of witnesses before a grand jury. Yet there is reason to believe, as will be discussed later, that the two civil cases denying inspection which the plaintiff has previously cited stem in large part from the single sentence quoted above:

> "It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will."

Cases dealing with the use of specific testimony, as distinguished from attacks on the sufficiency of the indictment, [fol. 2120] have rarely contained such language, the question there being simply that of secrecy. The rule is that expressed by the Supreme Court in a statement in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-4 (1940):

> "Grand jury testimony is ordinarily confidential. See Wigmore, *supra*, § 2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. See *Metzler* v. *United States*, 64 F.2d 203, 206."

Atwell v. *United States*, 162 Fed. 97 (4th Cir. 1908), in an early expression of this rule, reversed a contempt citation against a grand juror for disclosure of testimony of witnesses before the grand jury. The Court said:

> "To what extent, then, does the policy of the law require this secrecy to be maintained? In general terms it may be answered: To the full extent necessary to fulfill the ends of justice, and no further. Very certain it is that it should be maintained during the sittings and deliberations of the grand jury, for its sole province is to make a preliminary and ex parte investigation, to ascertain if probable cause for presentment be found. * * *
>
> "* * * What reason, therefore, can exist why the grand jurors, under such conditions, should be bound to secrecy? We can see none; and for these reasons we hold this fourth obligation of the grand juror's oath to require secrecy only so long as the policy of the

> law requires, and that that policy does not require it, so far as the evidence adduced before the grand jury is concerned, after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged." (162 Fed. 100-1)

Rule 6(e) would seem to make approval of disclosure by the Court necessary now, but the same principles apply. [fol. 2121] In *United States* v. *Byoir*, 147 F.2d 336 (5th Cir. 1945), the Court approved the disclosure on the petition of a defendant indicted in New York of grand jury minutes relating to an indictment of the same defendant in Texas, later dismissed, provided that the New York court held the evidence relevant and admissible. The Court expressed doubt as to the admissibility in the New York proceeding, but said:

> "On the merits of the appeal, the judge has discretionary authority to permit disclosure of what happened before the grand jury when necessary to advance the cause of justice." (147 F.2d 337)

The New York court subsequently quashed a subpoena for the transcript. This fact, however, does not affect the holding.

United States v. *Alper*, 156 F.2d. 222 (2d Cir. 1946), was a case on which Judge Learned Hand sat. The question was whether the district court properly refused to read a witness's grand jury testimony at the request of accused's counsel to ascertain whether it was contradictory to that he gave at the trial. The Court stated in an opinion by Judge Swan:

> "After an indictment has been found and the accused apprehended, the veil of secrecy surrounding grand jury proceedings may safely be lifted where justice so requires. [Citations] * * * Whether the power should be exercised lies, like other matters pertaining to the conduct of a trial, within the court's discretion. In the case at bar it is unnecessary to determine whether there was an abuse of discretion in declining to have the minutes written up, since the case must be reversed for error in the instructions already discussed. But as the same question may arise on the new trial it

> [fol. 2122] seems desirable to refer to some of the matters which the judge should take into account in exercising his discretion. These will include the timeliness of the request for the minutes, the delay in the trial which may result, and the extent of the burden which will be imposed upon the judge by a comparison of the witness's grand jury testimony with his trial testimony." (156 F.2d 226)

After further discussion the Court concluded:

> "A great part of the law of evidence is based upon the practical difficulties that would incidentally arise from the admission of what, strictly speaking, is logically relevant; it is founded upon the recognition that here, as elsewhere in the law, we are seeking not logical perfection but the just settlement of a controversy. The duty we are discussing is preeminently in this class and it is particularly one about which it would be unsafe to generalize." (156 F.2d 226)

It will be noted that Judge Learned Hand concurred in this opinion. The reason is plain; the request involved no attack on the grand jury proceeding. Equally, the concept of secrecy was dismissed in a sentence. What concerned the Court was solely the practical aspect of what was requested.

United States v. *Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952), dealt with the right of a defendant indicted for perjury for testimony given before the grand jury to have access to that testimony. In an opinion, again by Judge Swan with Judge Learned Hand concurring, it was held an abuse of discretion to deny him such access. The same problem was presented to this Court shortly thereafter in *United States* v. *White*, 104 F. [fol. 2123] Supp. 120 (D.N.J. 1952), and the same result was reached.

The most recent Court of Appeals case is *United States* v. *Rose* in the Third Circuit, quoted in Point II B above, which also had this problem. As the quotation given shows, in reversing the District Court's refusal to permit disclosure of the defendant's testimony, the Court adopted the statement of the Supreme Court in the *Socony-Vacuum* case.

The subject was also considered recently by Mr. Justice Douglas, sitting as a Circuit Justice, in granting an application for bail by a defendant convicted in California, *Herzog v. United States*, 75 Sup.Ct. 349 (1955). The defendant in his appeal had raised among other things the fact that his counsel had not been permitted on cross-examination of a critical witness to inspect the grand jury testimony for impeachment purposes. Mr. Justice Douglas held that this was "a substantial question which should be determined by the appellate court" within the meaning of Rule 46(a)(2) of the Federal Rules of Criminal Procedure. He said:

> "There has been a conflict between the policy requiring secrecy of grand jury minutes and the policy which seeks to leave no stone unturned in seeking justice in a particular case. See In re Bullock, D.C., 103 F.Supp. 639. Rule 6(e) has partially resolved that conflict by allowing disclosure of the grand jury minutes 'in connection with a judicial proceeding.'" (75 Sup.Ct. 352)

After quoting at great length from *United States v. Alper*, he concluded:

> [fol. 2124] "It is obvious that, whatever the ultimate outcome, under that ruling Herzog's request for inspection of the grand jury minutes would have been treated differently in New York than it was in California. Which is the better way of handling the matter, or whether there is still another which is to be preferred, is a considerable question in the administration of justice.
>
> "I express no opinion on the merits. I only conclude that the question is a 'substantial' one 'which should be determined' by the Court of Appeals, within the meaning of Rule 46(a)(2)." (75 Sup.Ct. 353)

Thus there are two distinct types of criminal cases. The first embodies an attempt to secure grand jury minutes in order to have an indictment set aside for irregularity. It almost never succeeds. It is what Judge Learned Hand opposed so strongly. It does not properly raise the issue of secrecy but rather that of orderly procedure, although reference to secrecy is made in some of the opinions. Yet

even this principle is not as absolute as Judge Learned Hand once indicated. See, for example, the recent discussion of the problem by Judge Irving Kaufman in *United States* v. *Wolfish*, 127 F.Supp. 215 (S.D.N.Y. 1955). Rule 6(e) itself gives the Court discretion to inquire into the grand jury proceedings on a showing by the defendant of grounds for a motion to dismiss the indictment. However, we do not explore this subject further because it is not relevant here.

The second type of criminal case deals with a motion to inspect testimony for use for a particular purpose. The [fol. 2125] rule in these cases is (1) that grand jury proceedings are ordinarily secret, but (2) that when the grand jury's functions are ended (3) disclosure is wholly proper where the ends of justice require it. The courts then consider whether in the particular circumstances justice requires such disclosure. This rule has been stated by the Second, Third, Fourth and Fifth Circuit Courts of Appeals and by the Supreme Court itself. These statements assume greater force when it is recognized that these were criminal cases, where the liberal rules of discovery do not prevail. A general right to discovery was not in them a factor in determining what the ends of justice require, as it is in the present civil litigation.

B. To refuse disclosure would be contrary to the rationale of *Bowman Dairy Co. v. United States.*

A case arising in a somewhat different way from those discussed casts a good deal of light on the Supreme Court's liberal approach to discovery, and to its policy of putting the defendant on as nearly an equal footing as possible with the Government, even in criminal actions. This case is *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951).

The defendants had been indicted for violation of § 1 of the Sherman Act. Before trial they moved by means of subpoena under Rule 17(c) of the Federal Rules of [fol. 2126] Criminal Procedure for production by the Government of documents and other material secured by means other than seizures or process; and the District Court granted the motion and entered an order. The Government argued that Rule 16 relating to materials secured by seizure or process exhausted the right to material in cus-

tody of Government attorneys, and objected to disclosure of confidential informants. Production under the order was refused. The Government attorney with possession of the material was then held in contempt. The Court of Appeals reversed, and the Supreme Court granted certiorari.

The subpoena called for all material secured by means other than seizure or process in the course of the grand jury investigation or in the course of preparation for trial if such items:

> "(a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence . . . " (341 U.S. 217)

Mr. Justice Minton wrote the opinion for the Court, saying:

> "There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. It was material of this character which the Government was unwilling to stipulate to produce or to produce in obedience to the subpoena. [fol. 2127] Such materials were subject to the subpoena. Where the court concludes that such materials ought to be produced, it should, of course, be solicitious to protect against disclosures of the identity of informants, and the method, manner and circumstances of the Government's acquisition of the materials." (341 U.S. 220)

The Court held, however, that clause (c) was a "catch-all provision, not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up." It was held invalid, and since the subpoena was bad in part, the attorney should not have been held in contempt. All concurred except Mr. Justice Black, who voted to affirm

the District Court, and Mr. Justice Clark, who did not participate.

No mention was made at all of the secrecy of the grand jury proceedings, though certainly "material that had been used before the grand jury" would comprise "matters occurring before the grand jury" within the meaning of Rule 6(e) as much as would testimony. In fact, by striking the catch-all provision and limiting discovery to material presented to the grand jury and material to be offered as evidence at the trial, the Court increased the isolation of material used before the grand jury. It will be noted also that discovery as to these items was treated as a matter of right, not as a matter of discretion.

The case is significant not only for its treatment of the [fol. 2128] the grand jury issue but also as showing the disposition of the Supreme Court to give the antitrust defendant, within the utmost limits of the rules applicable, and even in criminal cases, full discovery. Once again, as in the *Cotton Valley Operators* case, the claims of the Government to a privileged position were disregarded.

C. Those civil cases which deny access to grand jury testimony should not be followed.

There remains the question of access to grand jury testimony for use in subsequent civil proceedings.

As far as secrecy is concerned, the rule must necessarily be the same—that "after the grand jury's functions are ended, disclosure is wholly proper where justice requires it", in the words of the Supreme Court in the *Socony-Vacuum case*. Justice is the right of civil litigants, too.

In a civil case, what constitutes justice must be decided on the basis of the rules for civil litigation. Liberal discovery rules entitle a defendant to access to all relevant material available to the plaintiff. Mutuality is a principle of civil discovery, and the supplying by the defendants to the plaintiff of documents and testimony of a highly confidential nature deserves consideration. Justice does not lie in the preservation of a secrecy for which no rational basis exists.

[fol. 2129] In re *Grand Jury Proceedings*, 4 F. Supp. 283 (E.D.Pa. 1933), allowed the disclosure by Government attorneys, in a proceeding elsewhere to revoke a beer permit,

of testimony before a grand jury still sitting. Judge Kirkpatrick said:

> "It is sufficient to say that the rule of secrecy has long since been relaxed by permitting disclosure whenever the interest of justice requires. The determination of this matter necessarily rests largely within the discretion of the court whose grand jury is concerned. (4 F. Supp. 284)
>
> * * * * * * *
>
> "The fact that the grand jury has adjourned and been discharged has often been considered as one reason for abandoning secrecy as to its deliberations. It is, however, not the only circumstance which may move the court, nor is it essential to the exercise of its discretion. It yields to the general consideration whether the ends of justice will be furthered by the disclosure. In every case the court is called upon to balance two policies, the one requiring secrecy, the other disclosure." (4 F. Supp. 285)

The plaintiff has previously cited two civil cases which reach a contrary conclusion. These are *United States* v. *General Motors Corp.*, 15 F.R.D. 486 (D.Del. 1954), and an unreported discussion from the bench in *United States* v. *Morgan*, Civil 43-757 (S.D.N.Y. Dec. 8, 1948).

Both of these cases are distinguishable on the facts. In addition, both decisions embody an incorrect statement of the law. In each Judge Learned Hand's famous sentence in the *Garsson* case was applied in a manner in [fol. 2130] which its context in that case shows it was never intended to be used. Neither case should serve as a precedent in the decision of the pending motion.

The factual situation in *United States* v. *General Motors Corp.* was entirely different from the present case. It was an action for triple damages under the Elkins Act. The claim was that Baltimore & Ohio Railroad had favored General Motors with a rebate. Two grand juries investigated under the criminal provisions of the Elkins Act. The first indicted the railroad, and the second returned a "no true bill" in General Motors' favor. Thereafter, the stat-

ute of limitations having run on further criminal proceedings, the present action was begun against General Motors alone. A motion was filed under Rule 34 for the production of transcripts of the two grand jury proceedings. Judge Leahy, after an extended discussion, concluded:

> "My beliefs coincide with those expressed by Judge Learned Hand in U. S. v. Garsson, D.C., 291 F. 646, 649: 'It [i.e., the disclosure of the transcript] is said to lie in discretion, and perhaps it does but no judge of this court has granted it, and I hope none ever will.'" (15 F.R.D. 488)

In support of the denial the Court in a footnote cited 22 cases also denying disclosure. Of these, 19 were cases where the defendant asked for the transcript in order to attack the indictment. The remaining three cases cited were *Metzler* v. *United States*, 64 F.2d 203 (9th Cir. 1933); [fol. 2131] *United States* v. *Cohen*, 145 F.2d 82 (2d Cir. 1945), *cert. denied*, 323 U.S. 799 (1945), which without discussion held it not error to refuse inspection of testimony of a witness who had died before trial and whose testimony would be hearsay; and *United States* v. *Owen*, 11 F.R.D. 371 (W.D.Mo. 1951), which reached a conclusion opposite from that of the Third Circuit Court of Appeals in *United States* v. *Rose* and this Court in *United States* v. *White* as to the right of a perjury defendant to his own testimony.

None of these cases is applicable. The discussion in none of them confirms Judge Leahy's analysis except *United States* v. *Owen*, in which the holding was directly opposed to the law in this Circuit. Indeed in *Metzler* v. *United States* in approving use at the trial of defendants' statements before the grand jury the Court said:

> "After the indictment has been found and made public and the defendants apprehended, the policy of the law does not require the same secrecy as before. Atwell v. U.S. (C.C.A. 4), 162 F. 97, 100, 17 L.R.A. (N.S.) 1049, 15 Ann. Cas. 253; U.S. v. Amazon Industrial Chem. Corp., supra. Where the ends of justice can be furthered thereby and when the reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised." (64 F.2d 206)

United States v. *Rose* was decided subsequently in the Third Circuit. That case proceeds to its conclusion by a train of reasoning absolutely incompatible with the discussion of the law in the *General Motors* decision, which [fol. 2132] has accordingly been robbed of whatever force it may have had.

The ruling in *United States* v. *Morgan* was made in the course of a colloquy with counsel, and it is difficult to put it in context. The substance of the discussion appears at pages 276-279 of the record, which are contained in Appendix A to the plaintiff's brief dated November 1, 1954 in opposition to the original motion of Procter & Gamble. Judge Medina's position is expressed by the following statements:

> "The Court: Mr. Carson, I think you are wasting time on this part about getting me to direct that the Government give the defendants copies of the Grand Jury minutes. I have been thinking about that a good deal since I read these briefs, and I just am not going to be the first Judge in this District to do that. I think it is a very unwise thing to do. (pp. 276-7)
>
> * * * * * * *
>
> "The Court: No, I think my mind is set on it: It may be that I have been unduly affected by that statement of Judge Learned Hand. It may be my experience over the years in these matters has so solidified my judgment that I am not open to argument on it, and I may be wrong, but I do believe I am past the point where the argument would persuade me." (pp. 278-9)

An inspection of the file indicates that by a motion dated October 20, 1948 the defendants had served upon the plaintiff a notice of motion for production of all documents in the plaintiff's possession "in connection with this action or with the investigation conducted by the plantiff preliminary to the commencement of this action." [fol. 2133] In some manner not shown in the file the question of grand jury minutes arose, and on December 7, 1948 an 8-page memorandum requesting access to such minutes was filed.

This memorandum recited that no such request had been made in the motion but appealed to the Court's discretion.

It was this situation with which Judge Medina dealt on the following day, December 8, 1948. As the discussion on the record shows, only one of the 11 independent law firms acting as counsel appears to have been disposed to argue the matter. The need for access was not like that in the present case. In *United States* v. *Morgan* the plaintiff did not as here rest on the grand jury testimony, but began early to take extensive depositions. At the time of the argument on December 8, 1948, three depositions had been taken and 14 additional depositions had been noticed. Our information does not show the extent to which the grand jury proceeding and the complaint were coextensive, or how much the grand jury was used for civil discovery.

It is impossible to say, of course, what weight these factors had with Judge Medina.

This ruling came quite early in the post-war development of the big case. It was not until three years later that the *Report of the Judicial Conference*, 13 F.R.D. 62 (Sept. 26, 1951), was published. The ruling also preceded [fol. 2134] cases placing the Government on the same level as the defendants in antitrust cases, such as the *Bowman Dairy* and *Cotton Valley Operators* cases. In addition, it is apparent that it was based largely on Judge Learned Hand's inapplicable dictum.

The *Morgan* and *General Motors* cases thus suffer from the same defect, and they should not be followed. For the reasons discussed before, the motion for disclosure of the testimony of all witnesses before the grand jury should be granted.

Point IV

As a minimum, disclosure should be granted as to those witnesses who consent.

A. Consent of the witness is a recognized basis for disclosure of testimony.

The only reason assigned for grand jury secrecy which is remotely relevant in the present case is inducement of witnesses to testify. The privilege thus extended to wit-

nesses expired when the grand jury's functions ended. These subjects were considered in Points II B and C. But even if the privilege had not ended, it would surely be competent for a witness to waive it and consent to disclosure. Thus 8 Wigmore, *Evidence* § 2362 says:

> "The privilege, therefore, is not the grand juror's; for he is merely an indifferent mouthpiece of the disclosure. Nor is it entirely the State's; for the State's [fol. 2135] interest is merely the motive for constituting the privilege. The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the *privilege* must therefore be *that of the witness*, and rests upon his consent."

United States v. *Rose* is in accord. In permitting the defendant to have access to his own testimony before the grand jury, the Court said:

> "Since all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings." (215 F.2d 630)

In re *Bullock* contained an assumption by the Court that such a consent would be sufficient, although it was not actually forthcoming:

> "Since the respondent declined voluntarily to consent to the disclosure of the Grand Jury minutes, this opinion will be concerned with the Court's power under the first part of Criminal Rule 6(e)." (103 F. Supp. 641)

There is one unreported case precisely in point, *United States* v. *Standard Oil Co. of California*, No. 11584-C (S.D. Cal. July 6, 1955). Attached as Appendix A is the part of the opinion which relates to grand jury testimony. On the general subject, Judge Carter said:

> "There are valid reasons why grand jury transcripts should not be made public. The citizen should be permitted to testify without fear that his testimony will

be made public. This objective is served if the witness is given the right to determine if his testimony [fol. 2136] shall be thereafter made public. No bars however can come in this case, from supplying the defendants with the names of those testifying before the grand jury."

This approach appears unduly restrictive; but it is certainly preferable to an absolute bar to discovery. It is also an approach that has never been rejected, so far as we can discover. Specifically it was not considered in either *United States* v. *Morgan* or *United States* v. *General Motors Corp.*

It is difficult to imagine what harm could come from this procedure. If the witness consents, there is no reason for the plaintiff to object. Counsel for the plaintiff profess to see a threat to the future functioning of the grand jury system. Unless the attorneys for the Government are in the custom of assuring witnesses that their testimony will never be disclosed even if they consent to disclosure, the threat is hard to discern.

B. Disclosure of consenting witnesses' testimony would continue the procedure already in operation for documents.

After the submission of Plaintiff's General List No. 1 dated May 15, 1953, the plaintiff's attorneys undertook the burden of getting in touch with all of those on the list and asking whether they would consent to disclosure [fol. 2137] to the defendants of the documents in the possession of the plaintiff.

Subsequently there was entered a stipulation which was approved by this Court on July 15, 1953 giving the defendants the right to inspect and copy the documents of 37 of these non-defendants who consented. The plaintiff and the defendants have since that time cooperated in obtaining the consents of additional non-defendants.

No question was raised by the plaintiff as to propriety or usefulness of this procedure. Yet, with the exception of the grocery chain store representatives, the witnesses represent the same non-defendant business entities, so far as we now know.

It is hard to see as a matter of principle why this consent system should be accepted readily as to documents but rejected as a threat to the future functioning of the grand jury system in the case of testimony.

We submit that the consent procedure has already proved itself to be proper and useful. The explanation for the plaintiff's inconsistent position must be that it knew, in view of the *Bowman Dairy* case and other cases, that it could not preserve its advantage as to documents; but it is still striving earnestly to do so as to testimony.

[fol. 2138] Conclusion.

It is respectfully submitted that the motion for disclosure of testimony before the grand jury should be granted.

Respectfully submitted, O'Mara, Schumann, Davis & Lynch, By Edward J. O'Mara, A member of said firm. Cahill, Gordon, Reindel & Ohl, Attorneys for Defendant Colgate-Palmolive Company.

Of Counsel: Mathias F. Correa, Jerrold G. Van Cise, James B. Henry, Jr.

November 28, 1955.

[fol. 2139] Appendix A To Memorandum

Filed July 6, 1955, Clerk, U. S. District Court, Southern District of California, by Deputy Clerk.

In The United States District Court, Southern District Of California, Central Division

No. 11584-C

United States Of America, Plaintiff,

v.

Standard Oil Of California, et al, Defendant

Court's Pretrial Memorandum No. 1

Carter, James M., District Judge.

The defendants, Standard, Shell, Texas, Richfield, General Petroleum, Tidewater and Union Oil, have filed sets of interrogatories to which plaintiff has filed objections.

The matter was briefed, argued and heretofore submitted. The interrogatories are very extensive—in fact it might be said that the defendants ask to know about everything in plaintiffs files in the way of documents, FBI reports, grand jury transcripts, names of all witnesses interviewed, and all [fols. 2140] statements taken. The defendants use the terms "prepared for or submitted to grand juries" and "read or used" by plaintiff's attorneys, in the preparation of this case, as a supposed limitation. The plaintiff, in turn, resists with a broad opposition, raising so-called government privilege, informer's privilege, secrecy of FBI reports and grand jury transcripts, relevancy, etc.

The purpose of defendants' interrogatories, insofar as documents are concerned, is to secure an identification of them so that thereafter a motion to produce may be made. In this particular respect, and generally, the court has indicated that it intended to cut through form, and if possible avoid the necessity of further motions.

Mr. Lasky suggested at the argument, that the court might enter some sort of a pretrial order, stating the principles which it thought applicable to the problem, and that with the guidance of that set of principles, counsel might solve the problem. (TR. 167) In view of the broad scope of the requests and the broad opposition, the court thinks this desirable.

The court will therefore discuss some of the problems involved; will not at this time make an order but will indicate what rules and principles are involved and what action [fol. 2141] the court may take as to the various categories involved in the interrogatories.

I

Grand jury transcripts and testimony.

There are valid reasons why grand jury transcripts should not be made public. The citizen should be permitted to testify without fear that his testimony will be made public. This objective is served if the witness is given the right to determine if his testimony shall be thereafter made public. No bars however can come in this case, from supplying the defendants with the names of those testifying before the grand jury.

The court proposes:—

1. That the plaintiff supply the name and identification of all witnesses appearing before the 1947-1948 grand jury, except "informers" as hereafter discussed. The "in camera" report shows a total of 42 witnesses; 17 *were then* officers or employees of defendants, and supply the name and identification of each witness appearing before the 1939 grand jury, which plaintiff proposes to use at the trial of the action. The "in camera" report shows 7 of such witnesses at the 1939 session.

[fol. 2142] 2. That if the written consent of a witness be obtained, a copy of the transcript of such witness's testimony be supplied the defendants. If such witness consents, then obviously there is no informer privilege to be protected. This would probably make available all the transcripts of the executives and officers of defendant corporations.

The consent of each witness should only be obtained by addressing a letter to him, asking for consent, and enclosing a form on which the consent may be endorsed. The letter and form of consent should be approved by the court.

The defendants should undertake the obtaining of the consents.

3. That the government go over the list of witnesses before the grand jury at the 1947-1948 session, and eliminate from this list of witnesses to be supplied, those witnesses whom the government considers to be "informers" and only such informers, as the government does not intend to call as witnesses in the trial of this action. That the government submit to the court "in camera," the names of such alleged informers who the government does not intend to call as witnesses at the trial of this action, and supply (a) a summary of the evidence by each such witness, and (b) the reasons why the government considers him to be an "informer."

[fol. 2143] 4. If any such claim of informer privilege is made by plaintiff and sustained by the court after inspection of such "in camera" material, the court intends to direct that the identity of the informer be not revealed, and that all facts leading to his identity be withheld, but that

a summary of the witness's testimony be supplied to the defendants.

5. The government has agreed to supply names of all witnesses to be called at the trial, and summaries of their testimony. Query, as to supplying defendants a copy of the grand jury testimony of such witnesses, where no consent has been obtained. The fact that the government intends to call the witness and to supply a summary of his testimony, makes the question as to supplying of a copy of his grand jury testimony, appear almost moot.

6. Defendants disclaim any interest in the 1939 grand jury transcripts, other than as to those witnesses who will be called at this trial.

7. In conclusion, this will leave a residue of witnesses—

(a) not executives or officers of defendants
(b) not informers
(c) who do not consent, and

[fols. 2144-2145] (d) who the plaintiff does not intend to call.

The list would be short; defendants would have name and identification, and could interview them. The fact that they were not being called by plaintiff would indicate their testimony had no value to plaintiff's case.

* * * * * * *

Dated: July 6, 1955.

James M. Carter, United States District Judge.

[fol. 2146] In United States District Court for the District of New Jersey

[Title omitted]

Brief of the United States in Opposition to Motions for Production of Grand Jury Transcripts—December 7, 1955

Each of the defendants has moved the Court to compel disclosure of the transcripts of testimony of all witnesses who appeared before a grand jury sitting in Newark from

May 1951 through November 25, 1952, in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

The defendant Lever in its motion also asks that plaintiff be required to furnish the names of the witnesses appearing before said grand jury, but Procter states in its motion that the names of most if not all of the witnesses before the grand jury are already known, and Colgate states on page 2 of its memorandum in support of its motion that the defendants are aware of the identity of twenty-eight grand jury witnesses, and that eighteen of said twenty-eight were then or had previously been officers and employees of the defendants in this action.

[fol. 2147] The principal contentions advanced by defendants are: (1) that the Court may order disclosure of grand jury testimony where the interests of justice require, and that considerations of fairness and the liberal policy of the discovery rules require disclosure here; (2) that the government has no claim of privilege because the transcripts are in the possession and custody of the Court; (3) that the defendants are at least entitled to the testimony of those witnesses who will consent to disclosure, since at most only the witness' privilege is involved; and (4) that disclosure of testimony would be consistent with the procedure under which documents obtained by the government in connection with the grand jury are being made available to the defendants.

The government asks that defendants' motions be denied, on the grounds that (1) disclosure of any part of grand jury proceedings is contrary to public policy and is uniformly denied except under unusual circumstances, not present here, where the veil of secrecy must be lifted in the exercise of the courts' supervisory responsibility over the administration of justice; (2) the defendants are unable to justify the breach of grand jury secrecy in this case; indeed, the need for continuing secrecy is even stronger in the enforcement of the antitrust laws, where the grand jury must of necessity call upon employees and business associates of prospective defendants for testimony; (3) transcripts of testimony are in the possession and custody of the Attorney General, are not in this civil action subject to disclosure

under the Rules of Criminal Procedure, and, by virtue of the privilege accorded them by public policy, are beyond the reach of discovery process under the Rules of Civil Procedure; and (4) Lever's demand for the names of grand jury witnesses lacks substance in the face of the knowledge admitted by other defendants, and is barred by privilege. [fol. 2148] In the interest of brevity we shall make only limited reference in this brief to the arguments and authorities set forth in the government's brief filed on November 3, 1954 in opposition to Procter's motion for production of grand jury transcripts, and in the government's answer filed on November 9, 1955 in opposition to Procter's objections to the taking of the deposition of Mr. Siddall. The government's position was also referred to in its brief filed on October 28, 1955 in support of its motion to compel answers.

Question Presented

May the defendants in a civil action secure transcripts of grand jury testimony for discovery purposes?

Argument

I

Disclosure of grand jury transcripts is contrary to established public policy.

Unlike many another hoary "rule" less solidly imbedded in public policy, the rule of grand jury secrecy has not been eroded by exceptions, but, thanks to the firm protection of the courts, stands today as a stout barrier to invasion of the traditional privacy of the grand jury system. To be sure, the courts in the exercise of their supervisory powers over the functioning of the grand jury system upon rare occasions have been constrained to lift the veil of secrecy in isolated cases, as noted in the government's brief filed on November 3, 1954, in opposition to Procter's motion. But, as observed by the Court of Appeals for this Circuit in *United States* v. *Rose*, 215 F. 2d 617, 629 (C.A. 3, 1954), these instances represent not the rule, but rather exceptions to the rule.

Apart from cases involving irregularities in the grand jury proceedings, which concededly are not in point here, [fol. 2149] disclosure of grand jury testimony to defendants

has been allowed only in cases where the defendants are charged with perjury before the grand jury. Even there, the defendants have been permitted access solely to their own testimony. *United States* v. *Rose, supra*; *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2, 1951), cert. den. 343 U.S. 907, 72 S. Ct. 580 (1952); *United States* v. *White*, 104 F. Supp. 120 (D.C. N.J. 1952). The extremely narrow range of circumstances in which the courts have been willing even to consider lifting the veil of secrecy is shown by the cases cited by defendants. The inapplicability of such cases here is shown in the government's brief filed on November 3, 1954, pp. 6-9.

The defendants also call attention to *Herzog* v. *United States*, 75 S. Ct. 349 (1955). There, after referring to *United States* v. *Alper*, 156 F. 2d 222 (C.A. 2, 1946), discussed in the government's brief filed November 3, 1954, page 9, Mr. Justice Douglas, sitting as a Circuit Justice, found that there was a "substantial" question whether a *trial court* should inspect a witness' testimony before a grand jury to see if the witness had impeached himself. The question presented here, whether the defendants are entitled to inspect the grand jury transcript in advance of trial for discovery purposes, was not in issue, nor was any suggestion made as to how this question should be determined.

It is urged, nevertheless, that many of the cases denying defendants access to grand jury transcripts are based upon an erroneous and uncritical application of Judge Learned Hand's vigorous statement against disclosure in *United States* v. *Garsson, et al.*, 291 Fed. 646, 649 (S.D. N.Y., 1923) (Colgate memorandum, p. 35; Lever brief, p. 13). The defendants contend that Judge Hand's concurrence in the [fol. 2150] *Alper* ruling represents some relaxation of his statement in *Garsson*. The same argument was made to Judge Medina in *United States* v. *Henry S. Morgan, et al.*, Civil Action No. 43-757, S.D. N.Y., filed October 30, 1947, in support of the claim:

> . . . that it rests in your Honor's discretion whether it [the veil of secrecy] should be lifted in a discovery proceeding in a case of this immense scope where the plaintiff has the advantage of accumulating the material for many years.

To this Judge Medina replied:

> I don't think that is any modification of Judge Learned Hand's views. (Transcripts of Hearing, December 8, 1948, pp. 279, 280, attached to Government's Brief of November 3, 1954.)

The cases referred to above involve the question of when and under what circumstances the courts should lift the veil of secrecy in the exercise of their supervisory responsibilities over the grand jury and in the administration of criminal justice. However, the instant motions do not properly involve this Court's supervisory responsibilities under the Criminal Rules, despite Colgate's express effort to invoke the discretion of the Court under Rule 6 (e). It is clear that the defendants here are seeking the grand jury transcripts solely for discovery purposes.

Notwithstanding the relative novelty of this extraordinary claim, the precise question presented here has been squarely raised before other courts. In two cases factually [fol. 2151] indistinguishable from the present case the courts ruled squarely that the argument for disclosure, no matter how liberally the purpose of civil discovery may be viewed, cannot justify endangering the grand jury system. In *United States* v. *General Motors Corporation*, 15 F.R.D. 486 (D. Del. 1954), Judge Leahy apparently considered the rule of secrecy as having even greater force in civil cases, when he said:

> Even in a criminal case, only extraordinary circumstances ever prompt a court to exercise a discretionary power to disclose. (p. 486)

In his carefully reasoned opinion Judge Leahy refutes the claimed need of defendants for the transcripts in a civil case, and shows that a precedent for disclosure "would tend to restrict the free function of the grand jury." (p. 487). This ruling is directly in point here, and the opinion offers persuasive reasons why the transcripts should not be disclosed.

In *United States* v. *Henry S. Morgan, et al.*, Civil Action No. 43-757, S.D. N.Y., filed October 30, 1947, Judge Medina was confronted with the same request made here. His views against disclosure of grand jury transcripts in a civil

antitrust case were so strong that he considered the matter unarguable, and when counsel urged that the veil of secrecy might safely be lifted in appropriate cases, replied:

> You see this veil of secrecy being lifted is one thing, but giving the defendants in an antitrust suit the copy of the grand jury minutes is a little different.
>
> (Transcript of Hearing Before Judge Medina, December 8, 1948, p. 279, attached to Government's Brief of November 3, 1954)

Against these persuasive rejections of the precise claim made here, defendants can cite only the statement by Judge Carter, in *United States* v. *Standard Oil Company of California, et al.*, Civil Action No. 11584-C, S.D. Calif., C. Div., filed May 12, 1950, Pre-Trial Memorandum No. 1, [fol. 2152] July 6, 1955, that no harm could come in that case from supplying the names of grand jury witnesses, and his proposal that the government supply the transcripts of testimony given by witnesses who would consent to disclosure. The memorandum in which this extraordinary proposal is put forward does not undertake to discuss the considerations which other courts have uniformly held an absolute bar to disclosure. As will be shown below, the possible consent of the witness is no justification for disclosure and the concomitant danger to the grand jury system.

Disclosure upon consent of the witness was recently urged in *United States* v. *Darling*, Civil Action No. 52-C-1716, E.D. Mich., So. Div., in an application made by the witnesses themselves for production of the transcripts of their testimony. One of the applicants was himself a defendant, and the others asserted the likelihood that they would be called as witnesses upon the trial of the civil action. In an order entered October 31, 1955, Judge Lederle found that the court for the Northern District of Illinois, Eastern Division, to which the civil case had been removed, was the proper court to decide the question. When the application was thereafter renewed before the latter court, Judge Perry stated at an unreported meeting of counsel held on November 18, 1955 for the purpose of setting a date for hearing, that he wished to inform counsel for the applicants immedi-

ately, after reading their brief, that he was going to overrule the motion.

The defendants here attempt to distinguish the *General Motors* and *Morgan* cases by indulging in completely unwarranted speculation in which it is implied, if not directly charged, that the government has employed the grand jury here for discovery purposes in preparation for this civil action, as a substitute for the discovery afforded by the civil rules. We submit that there is no justification for specula- [fol. 2153] tion of this kind, and question whether the defendants are not attempting to raise anew the charge of improper use of the grand jury process which this Court rejected in denying, on January 14, 1954, Procter's motion to suppress documents secured by grand jury subpoena. Any effort to secure grand jury transcripts on this ground would run directly counter to the unanimous refusal of the courts to permit impeachment of grand jury proceedings.

II

Disclosure of grand jury testimony cannot be justified by civil discovery purposes

The sole issue presented here is whether the defendants in this civil action may obtain the grand jury transcripts for discovery purposes. We have already referred to the opinion in the *General Motors* case, *supra*, in which Judge Leahy held that disclosure could not be justified for purposes of discovery in a subsequent civil action. Examination of the reasons commonly given for maintaining secrecy demonstrates that they outweigh any claim of need which may be based on discovery grounds.

Whatever the scope of a grand jury witness' privilege against being compelled to disclose his testimony as evidence in a subsequent proceeding (Colgate, pp. 8-10; Lever, pp. 14-16), the issues here is clearly not concerned with that right. The witnesses before the grand jury do not alone have an interest in the disclosure or the non-disclosure of their testimony.

The public, and the government acting in the public interest, are concerned with the preservation of secrecy of grand jury proceedings for four reasons which persist even though the grand jury has been discharged. As summar-

ized in *United States* v. *Rose*, *supra*, these reasons are as follows:

> [fol. 2154] . . . (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. (215 F. 2d. at p. 628)

Because the issues in this case involve conduct which may also form the basis of criminal charges under Sections 1 and 2 of the Sherman Act, the application to antitrust cases of the four reasons quoted above from *United States* v. *Rose* is readily apparent. We do not consider it necessary to stress here reason (3), the danger of subornation of perjury or tampering with the witnesses who have testified before the grand jury, but we note the danger in a precedent which would be applied in other cases and to other defendants.

As to consideration (2), defendants argue that release of the grand jury transcript would not expose the deliberations of the grand jury. But it is inescapable that the release of the testimony presented to the grand jury would expose the basis of its deliberations and might lead to criticism and challenge of its actions.

The suggestion that there can be no harm in disclosing the testimony of those witnesses who will consent ignores the fact that any privilege the witness may have arises out of the state's interest in preserving the integrity of the grand jury system, which is paramount to the interest of any individual witness, or any single investigation. The defendants' employees and those who do business with them might well be coerced into disclosure of matters thought to have been given in strictest confidence, rather than invite the defendants' displeasure. To sanction such a course would give notice to every witness hereafter in a grand jury

proceeding that some day in the future he too may be [fol. 2155] confronted with this difficult choice, and would seriously endanger safeguards erected over the centuries to assure that grand jury witnesses "feel free to speak the truth without reserve." *Goodman v. United States*, 108 F. 2d 516, 519 (C.A. 9, 1939).

Defendants have studiedly ignored in their briefs the effect that fear of disclosure of the testimony of a witness would have upon the willingness of the witness to testify freely before the grand jury. This consideration goes directly to protection of the investigative function of the grand jury itself, so as to assure to that body testimony given by witnesses who are free from fear of reprisals occasioned by the baring of their testimony. As shown in *Goodman* v. *United States*, *supra*, freedom from just this fear has been held to be essential to grand jury investigation of violations of the antitrust laws. This reason for protecting the grand jury given in the *Goodman* case is even more forceful today when Rule 6(e) (Federal Rules of Criminal Procedure) has removed the requirement previously in effect in some districts that the witness be sworn to secrecy.

It is not enough to say that the consent of those who testified shall automatically operate to release to public scrutiny their testimony. Most, if not all, of these witnesses, are agents or employees of the defendants, or are engaged in some aspect of the soap industry and thus may be susceptible to pressure by these powerful defendants. They may not, therefore, be in a position to deny consent. In a sense such witnesses must be protected against themselves, if in future investigations grand juries are to obtain "free and untrammeled disclosures."

As to consideration (5), the fact that a grand jury investigation results in the filing of a suit against only a few persons or firms does not warrant the conclusion that the [fol. 2156] investigation was directed only at the persons finally named as defendants. The grand jury may have investigated the possibility of criminal conduct by others who, on the basis of all the testimony presented, appear to be be innocent of any wrongdoing. Yet the activities of such innocent persons may be pictured in a most unfavorable light unless all the transcripts of grand jury testimony

are revealed. These innocent persons may, therefore, be compelled to consent, as the lesser of two evils, to the revelation of their testimony, or the testimony of their employees, and thus be deprived of the protection of grand jury secrecy.

The fact that the government has previously consented to an order permitting the defendants to inspect and copy documents in its possession, including some which were first subpoenaed by the grand jury, is not a precedent for the revelation of grand jury testimony. These documents are in the possession of the government by consent of the owners and not pursuant to any grand jury process. Moreover, there is a vital distinction between documentary and testimonial disclosure. The documents existed prior to the calling of the grand jury. As Judge Medina said in distinguishing documents from testimony, in the *Morgan* case, *supra*, "they [documents] do not gain immunity by being shown to the grand jury." (p. 276 of colloquy appended to the government's brief in opposition to Procter's motion to disclose the grand jury transcripts, filed November 3, 1954.) Testimony taken by the grand jury, on the other hand, is quite another thing. It has no existence, as it were, other than before the grand jury, and it is by this very nature immune.

Against these compelling considerations for maintaining the privacy of the grand jury room defendants advance only three reasons in favor of disclosure: (1) that it is unfair [fol. 2157] to deny them access to material to which the government has had access; (2) that the grand jury transcripts would aid them in their preparation for trial; and (3) that some witnesses may forget their grand jury testimony and be charged at the trial with making inconsistent statements.

Even if taken at full value these contentions would not justify disclosure. As Judge Leahy said in his opinion in the *General Motors* case, *supra*, discovery "must be halted when it attempts to invade ground reserved for loftier reasons than the roughness of preparing one's case on the civil side of the court" (pp. 486-487). In rejecting the discovery claim made there the Court disposed of the principal contentions urged by the defendants here:

> It is argued the Department of Justice will have the transcripts of the Grand Jury available and may use

> them, and such, it is suggested, will be a tactical advantage the discovery rules were designed to eliminate. But defendant here has other discovery techniques at its disposal through which most of the information sought and clues to other possible sources may be obtained. . . If a precedent is set that evidence before a grand jury may at some future time be disclosed to the probing examination of civil litigants in preparation of the trial of their cause not alone in a collateral matter but, as in the case at bar, in directly related matters where the inquisitorial examination of the grand jury and a civil litigant's discovery in preparation for trial encompass the same subject matter and include an identity of events, such precedent would tend to restrict the free function of the grand jury. (pp. 487-488)

Here the defendants concede that they have long been aware of the identity of most if not all of the witnesses who testified before the grand jury, and that they could discover the identity of any others (Colgate brief, p. 11; Lever brief, p. 7; Procter motion, p. 2). Undoubtedly, in view of the description of witnesses set forth in Colgate's brief, p. 2, they have already had access to these sources of information, and they may freely question those who have knowledge of relevant facts, short of using the process [fol. 2158] of the court to compel disclosure of what was said in the privacy of the grand jury room.

Moreover, the defendants for several months have had statements of the issues in this case, as the government sees them, and have had an oportunity to question the government in detail about them. The alleged fact that some of these witnesses may no longer recall the precise language they used before the grand jury does not, in these circumstances, unfairly prejudice the defendants. The defendants have no right nor any need to know the precise grand jury testimony of these witnesses. Such testimony is for present purposes completely irrelevant and immaterial to any issue in this litigation. What may be relevant and material here is the knowledge of any such witnesses of facts pertinent to this case, and such information could be readily obtained from them. In an analogous situation, where defendants sought to inspect and copy answers given by former dealers

to a government questionnaire, the court rejected may of the contentions made here, saying:

> . . . It is the statements made by these individuals under the circumstances indicated which the defendants now seek to inspect and copy. It is these statements as such which are privileged. (*United States* v. *Deere & Co.*, 9 F.R.D. 523, 527 (D. Minn., 1949)

The assertion that to avail themselves of their right under the Federal Rules to discover information relevant to this case by taking depositions would be expensive and time consuming certainly does not provide a basis for invading the traditional privacy of the grand jury. The mere fact that the grand jury and attorneys from the Department of Justice may already have covered some of the same ground, at considerable expense of time and money, is no reason for turning over to the defndants the product of that effort where the defendants have equal opportunity and ample means to dis ..er the same facts. Even in the absence of [fol. 2159] s ch considerations of public policy as are involved here, n *United States* v. *United Shoe Machinery Corporation*, 76 F. Supp. 315, 317 (D. Mass. 1948), Judge Wyzanski refused to order the production for the government of defendants' copies of its patents which the defendant had organized in a certain fashion.

Moreover, the release of the grand jury transcript would not, in all probability, diminish or eliminate the desires of defense counsel to take extensive depositions of these same witnesses, as suggested by Lever in its brief, p. 22, and by Colgate in its brief, pp. 11-12. Indeed, counsel for Procter assert that in the grand jury proceedings, witnesses were examined under oath "without notice to Procter, without opportunity by Procter to procure protective orders, without opportunity to explain or clarify by cross-examination." (Procter brief, September 24, 1954, p. 5.) Colgate makes a similar assertion in its brief, p. 11. These contentions suggest that rather than reduce deposition-taking, disclosure of the transcript to counsel for the defendants would inspire lengthy and extensive depositions of grand jury witnesses by them to "explain or clarify" the testimony. But such explanations or clarifications are clearly

only necessary or appropriate if, as and when such testimony is educed at the trial.

As noted above, discovery under even the most liberal construction of the rules is not without its limits. Even where a formal claim of privilege will not lie, material less carefully guarded than grand jury testimony may not be had merely for the asking. As the Supreme Court said in *Hickman* v. *Taylor*, 329 U. S. 495 (1947):

> . . . Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired.
>
> * * * * * * * * *
>
> [fol. 2160] We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.
>
> * * * * * * * *
>
> In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal

of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. (pp. 508-510)

III

Transcripts of grand jury testimony are protected against production by the exception accorded privileged documents under Rule 34.

A. Defendants' motions are governed by Rule 34.

Although none of the defendants expressly predicates its motion upon Rule 34 of the Rules of Civil Procedure, it is clear that their motions are governed by this rule, since it is the one which authorizes the courts to require the production of documents in civil actions, and imposes limits upon the scope of the production which may be directed. *Hickman* v. *Taylor, supra.* Rule 34 expressly qualifies the production which may be ordered by confining it to documents "not privileged." If, therefore, the transcripts of grand jury testimony which are in the possession and custody of the Attorney General are to be regarded as privileged within the meaning of Rule 34, their production may [fol. 2161] not be required under civil discovery. This is in effect conceded in Colgate's brief (p. 21).

Perhaps in recognition of the force of this argument, Colgate has chosen to found its motion on Rule 6 (e) of the Rules of Criminal Procedure. However, under the applicability provisions of the Rules of Criminal Procedure (Rules 1, 2 and 54), Rule 6 (e) pertains only to criminal proceedings. We do not concede that in a criminal action any different result would be reached under Rule 6 (e) than in a civil action under Rule 34, because the decisions governing disclosure in criminal proceedings impose an almost absolute secrecy, subject only to the limited exception discussed above. The distinction is important, however, because the discretion recognized by Rule 6 (e) is based upon the court's responsibilities for supervision of the grand jury and for the protection of the rights of those accused in criminal actions, whereas these responsibilities are not involved in an application for civil discovery purposes, and there is no occasion for the exercise of discretion, once the privileged character of the transcripts is

recognized. The considerations pertinent to the exercise of the Court's discretion under Rule 6 (e) are not present here and there is neither justification nor utility in examining Colgate's claim under Rule 6 (e).

B. Transcripts of grand jury testimony are within the possession and custody of the Attorney General.

Contrary to the defendants' contentions, transcripts of grand jury testimony are made at the instance of the government as an aid to the attorneys charged by the Attorney General with the duty of conducting grand jury investigations and are in the possession and custody of the Attorney General. The propriety of making such transcripts, and of their use and retention by government counsel was noted in *United States* v. *Amazon Industrial Chemical Corporation, et al.*, 55 F. 2d 254 (D. Md. 1931). In 1933 the Congress expressly authorized the taking of stenographic transcripts of testimony to assist counsel for the [fol. 2162] government, and on behalf of the United States:

> . . . the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function. (Act of May 18, 1933, 48 Stat. 58, amending Section 1025 of the Revised Statutes of the United States (18 U.S.C., Sec. 556). Cf. *United States* v. *Weathers*, 21 F. Supp. 763 (N.D. Ga., 1937))

This law was continued in effect by the Federal Rules of Criminal Procedure. Notes of Advisory Committee on Rules, Note to Subdivision (d) of Rule 6, 18 U.S.C., Federal Rules of Criminal Procedure, Rule 6, p. 2527.

The transcripts of testimony taken by stenographers thus employed under the authority of the Attorney General and paid for from the appropriation of the Department of Justice are not records kept by or under the control of the grand jury. Unlike such grand jury records as the minute book of attendance and voting kept by the grand jury, transcripts of testimony are never in the possession

or custody of the grand jury or of the clerk of the court. They belong to the Department of Justice and are kept pursuant to the authority conferred on the Attorney General by 5 U.S.C., Section 22, to prescribe regulations for the custody and use of departmental records, papers and property.

It follows that, contrary to the contention made by Colgate, the grand jury transcripts are in the possession and custody of the Department of Justice rather than in the possession and custody of the Court. They are, therefore, subject to a claim by the Department of privilege against production under Rule 34.

[fol. 2163] C. Transcripts of grand jury testimony are privileged against production under Rule 34.

By virtue of the secrecy surrounding grand jury proceedings, and the express prohibition in Rule 6(e) against disclosure, grand jury transcripts are regarded by the Department of Justice as highly confidential records. This view as to the confidential character of such transcripts has long been shared by the courts, as stated in *Goodman* v. *United States*, *supra*:

> . . . Through their participation in the proceedings both grand jurors and witnesses occupy a special relationship to the state; and for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential. Considerations of mere convenience or even of downright hardship on the part of the witness do not outweigh the policy of secrecy in respect of grand jury investigations. (p. 520)

We do not rest the government's claim of privilege upon the narrow ground that transcripts of grand jury testimony are the work product of government attorneys. To be sure, there is no essential difference between notes taken by an attorney for the United States and notes taken by a stenographer employed for the express purpose of assisting counsel for the government by making a verbatim report of questions and answers "for and on behalf of the United States," and the essential element of the work product privilege, as stated in *Scourtes* v. *Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio, E.D., 1953), " . . . that the legal talent and training of the attorney has been exercised

in initiating and directing the investigation," is obviously present. There is also a clear analogy to the situation in *United States* v. *Deere & Co., supra*, where it was held that answers to questionnaires submitted by government attorneys to former dealers of the defendant manufacturers were privileged against production under Rule 34. The decision in that case, however, recognized that the claim of privilege in an antitrust proceeding brought by the government rests upon public policy:

> [fol. 2164] There is no doubt that this rule [informer's privilege] would not apply to many cases involving the Government where the latter seeks to protect no public interest as such. Actions under the Anti-Trust Acts, however, are clearly actions based upon the public interest. This is apparent from the very nature of the laws. For they are designed to protect the commerce of the Nation, and their violation in many instances constitutes criminal activity. Although the instant action is not a criminal action, the basis of the privilege is one of public policy for protection of the public interest, not the criminal nature of the case. It is not for the protection of any person. The considerations which require the withholding of information and its source from the accused by the Government in criminal cases are present also in civil anti-trust actions brought for the public interest by the Government. Without the anti-trust laws and resulting actions to enforce them, monopoly would strangle competition and threaten the Nation's economic well-being. (p. 526)

It is clear that the case for according transcripts of grand jury testimony the status of privileged documents invokes loftier considerations than a mere proprietary interest in the work of an attorney. Ordinarily an attorney is free to reveal his work as he sees fit, subject only to his obligations to his client; in the case of transcripts of grand jury testimony, however, counsel for the government are bound by a fundamental public policy directed toward the protection of the grand jury system itself. Even though Rule 6 (e) of the Rules of Criminal Procedure is not applicable in a civil action, the restraint which it imposes, and the repeated admonitions of the courts concerning the need

for secrecy, require that transcripts of testimony be shielded by a privilege based solidly upon public policy. And where public policy requires secrecy, discovery is barred. Thus, in *Castelluno* v. *Pennsylvania-Reading Seashore Lines*, 15 F.R.D. 276 (E.D. Pa., 1953) reports required to be submitted to the Interstate Commerce Commission under the limitation that they should not be used for any purpose in any suit for damages were shielded from discovery by public policy.

Disclosure of documents of a confidential character belonging to the Department of Justice is forbidden, pur- [fol. 2165] suant to statute, *supra*, by Department Order No. 3464, Supplement No. 4 (revised January 13, 1953), which provides, in pertinent part:

> . . . Specific authority is hereby given to each and every attorney in the Department of Justice now or hereafter in charge of any Government litigation, . . . to reveal and furnish to an actual or prospective witness, a grand jury, opposing counsel or a court, either during or preparatory to a judicial proceeding . . . such material and relevant documents or information as such attorney shall deem necessary or desirable to the discharge of his professional and official duties; provided, however, that no such attorney shall reveal or furnish any of such documents or information when by so doing, in his opinion, injury might be done to the public interest and shall not disclose the name or identity of any confidential informant or make available for any purpose to anyone outside the Department of Justice any investigative report of the Department or any copy thereof without express prior approval by the Attorney General.

This Departmental regulation has the force of law. *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9, 1935). See also *Ex rel Bayarsky* v. *Brooks*, 51 F. Supp. 974 (D. N.J., 1943). In the *Sackett* case the court said:

> In view of the fact that under these regulations the documents, although physically in possession of the witness, are in law in the custody of the Attorney General and he is prohibited from producing them by the lawful rule of the Department, the court had no power or authority to compel him to do so. (p. 924)

The preclusive force of similar regulations prohibiting production of governmental documents where public policy is involved has long been recognized. *Boske* v. *Comingore*, 177 U.S. 459, 469, 470. Cf. *In re Appeal of S.E.C. ex rel. Timbers*, C.A. 6, memo opinion, decided October 19, 1955. And in *United States* v. *Reynolds*, 345 U. S. 1 (1953), in discussing the privilege against disclosure of government documents the Supreme Court made this significant observation:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. . . . Here, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of [fol. 2166] privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity. (p. 11)

IV

The identity of grand jury witnesses is privileged.

In connection with its motion for access to the grand jury transcript of testimony, Lever separately demands that the government be ordered to name the witnesses who appeared before the grand jury. (Lever motion, par. A.) Procter suggests this course as an alternative in its brief dated November 28, 1955, although in its motion, dated September 24, 1954, Procter states (par. c, p. 2) that "the names of most if not all of those who appeared and testified before the said Grand Jury . . . have been known for many months."

Without pressing the point that the defendants' concessions render their application substantially if not completely moot, we note that this demand also seeks to infringe upon the privileged sanctity of the grand jury, and should therefore be rejected. The government does not deny the right of the defendants to seek information in accordance with the discovery provisions of the Federal Rules of Civil Procedure, including the identity of persons having knowl-

edge of relevant facts. But this demand, like the defendant's motions for access to grand jury transcripts, is not grounded on any specified right of discovery accorded by the Rules of Civil Procedure, and for an obvious reason. Under the Federal Rules, a party may inquire only into matters *not privileged* (Rules 33, 26 (b)). *Hickman* v. *Taylor, supra.* The attempt here is to obtain information of the type usually sought by way of interrogatories, but to circumvent the privilege limitation of Rule 33 by moving without reference to the Rules. This does not, however, [fol. 2167] alter the essential character of the demand, nor escape the limitations imposed by the Rules. As the Supreme Court stated in *Hickman* v. *Taylor, supra,* at p. 505:

> ... The fact that the petitioner may have used the wrong method does not destroy the main thrust of his attempt.

The government submits that the identity of grand jury witnesses is privileged information, falling within the cloak of privacy drawn around the grand jury by public policy. The considerations set forth above as grounds for denying access to the grand jury room are also applicable to shield the identity of witnesses. Such disclosure would open the door to the very pressures against which witnesses must be protected in the interest of preserving the free function of the grand jury.

Further, there is a complete absence of any showing of cause for the disclosure sought. There is no showing that the defendants can not ascertain the identity of persons having knowledge of relevant facts without infringing upon the secrecy of the grand jury. The degree of cause shown here fails even to reach the threshold over which such a question must pass in the view of the Supreme Court as stated in the *Reynolds* case, *supra.*

December 7, 1955.

Respectfully submitted, Joseph E. McDowell, Raymond M. Carlson, Daniel H. Margolis, Robert Brown, Jr., Jennie M. Crowley, Attorneys, Department of Justice.

[fol. 2167a] [File endorsement omitted.]

[fol. 2168] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1196-52

[Title omitted]

SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE PROCTER & GAMBLE COMPANY IN SUPPORT OF MOTION FOR ACCESS TO GRAND JURY TRANSCRIPTS*—December 22, 1955

Preliminarily, we submit that plaintiff should be required to answer questions 1 (a), (b) and (c) propounded by the Court in its memorandum dated December 9, 1955 in order that the Court may have all facts relating to the use of the grand jury proceedings. However, even with these questions unanswered, we submit that the circumstances before the Court show clearly that, under the general prin-[fol. 2169] ciples stated by the Court on December 12th, the grand jury transcripts should be disclosed.

Admittedly, one purpose of the grand jury proceeding was to use the information obtained therein in deciding on and preparing for a civil action. (See this Court's opinion of May 11, 1953, p. 4-5, 14 F.R.D. 230, 233; plaintiff's affidavit of March 21, 1953, p. 1; Department of Justice press release of December 11, 1952.) We believe that it was the sole purpose and certainly that was true in the later grand jury stages when much of the testimony was taken.

Also admittedly, the grand jury transcript was taken to Washington and has remained there during the institution and the entire preparation of the civil case. Nor will it be denied that the grand jury proceeding was in fact used for civil purposes—so used in many ways:

(a) The civil complaint, filed sixteen days after the grand jury, was necessarily based in large part, if not entirely, on the grand jury documents and testimony.

---

*We do not propose to discuss herein the Lever request for a list of grand jury witnesses but we reserve the right to file a similar motion at a later date.

(b) Many of plaintiff's tentative statements of issues, for example alleged oral conversations, must have been based on grand jury information.

(c) The grand jury transcript has certainly been used by plaintiff in answering or not answering questions propounded by defendants pursuant to the direction of the Court. In fact, on at least one occasion, on November 12, [fol. 2170] 1954, plaintiff's counsel in refusing to answer a question said that if defendants had the grand jury transcript, they would know the answer to the question.

(d) It is most evident that the grand jury information has been at least the principal source from which the plaintiff up to this time has determined the factual and evidentiary scope of the case.

(e) The same is the case with plaintiff's determination of prospective witnesses and the subject of their testimony.

(f) While those parts of the grand jury transcript which are favorable to the defendants will not be actually used by plaintiff affirmatively, yet plaintiff has had the benefit of these matters in framing its case. These very parts may be of the greatest value to the defendants.

These various uses by the plaintiff of the grand jury information also demonstrates its value to the defendants.

The Government has had access to this evidence for a period of more than three years, during which it has utilized it as described above. The defendants need it for the preparation of their defenses. This need is greater because the complaint and the issues and plaintiff's answers [fol. 2171] to the questions propounded by the defendants under Your Honor's suggestion are all so vague. Defendants cannot be on an informational parity with the plaintiff in the preparation of this case without having these transcripts.

Furthermore, defendants' access to these transcripts would greatly expedite the preparatory and pretrial proceedings in this case. The grand jury product is the nub of this case. The sooner it is known to both parties, the sooner we can stop meandering around the penumbra of this case, and the more rapidly we can bring it to final issue and to trial.

A suggestion that defendants can obtain such informa-

tion by deposition of the grand jury witnesses is without merit. In the light of the broad scope of this case, it would be manifestly impossible, after three or four years, to reconstruct now evidence given at a time much nearer to the actual event. See *Thomas* v. *Pennsylvania R. Co.*, E.D.N.Y., 7 F.R.D. 610, 611; *Newell* v. *Capital Transit Co.*, 7 F.R.D. 732, 734.

Plaintiff suggests that access to the transcripts would also require depositions. But these depositions would necessarily be shorter than if we had not received some of the desired information from the grand jury proceedings. Despite plaintiff's apparent contention otherwise, the part is still smaller than the whole.

[fol. 2172] We will mention only a couple of plaintiff's contentions, as they have already been dealt with in the briefs and oral argument.

(1) Plaintiff contends that disclosure, even if consented to, would exert pressure on the present grand jury witnesses and future ones. Plaintiff seems to forget that no grand jury witness can ever be assured that his testimony will not in the future be disclosed. This is because of Criminal Rule 6(e) as well as because of the established common law principle that such disclosure will be made where the ends of justice require. Plaintiff also overlooks the fact, mentioned by Wigmore, that assurance of permanent non-disclosure would encourage false testimony before the grand jury. And, incidentally, who is the plaintiff to talk about pressure when the plaintiff has—and the grand jury witnesses know the plaintiff has—in its back pocket for its own private use years-old and complicated testimony which presents a problem of memory and of change in conditions.

(2) The plaintiff seeks to draw an analogy from informer's cases. We submit they are totally inapplicable to the question before us.

(a) Informer's statements are documents of the Justice Department, a part of the Executive Branch. Grand jury transcripts, though now in possession of the Justice Department, are documents of the grand jury, an arm of this Court, the Judicial Branch, and these documents, under [fol. 2173] common law and under Criminal Rule 6(e),

are subject to the disposition of this Court (our Supplemental Brief p. 1-2).

Even if the informer's privilege were to some extent analogous, the privilege is so circumscribed and limited by the courts as to be of no benefit to plaintiff. In fact, the privilege, as interpreted, is, if anything, helpful as an analogy to defendants.

(b) The informer's privilege applies only to the identity of the informer and not to the contents of his statement, and where the identity is known, the privilege disappears. 8 *Wigmore on Evidence* [3d ed.] § 2374; *United States* v. *Standard Oil of California, et al.*, No. 11584-C, S.D. Calif., Cent. Div., Pre-trial Memorandum No. 1, July 6, 1955, p. 3; *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221; *United States* v. *Shubert*, S.D.N.Y., 11 F.R.D. 528, 533-4; *Tobin* v. *Gibe*, D. Del., 13 F.R.D. 16; *Durkin* v. *Pet Milk Co.*, W.D. Ark., 14 F.R.D. 385, 390; *A.L.I. Model Code of Evidence* (1942), Rule 230, *and Comment*. In the instant case, the names of many—the plaintiff suggests the names of all—of the grand jury witnesses are known, and as to such witnesses there is no informer's privilege.

(c) As to any unknown grand jury witnesses, the informer's privilege could, at the most, apply to witnesses who offered their testimony pursuant to a promise that their identity would not be revealed. Such a promise could not properly have been given in this case, and there is [fol. 2174] nothing to indicate it was. Criminal Rule 6(e); *United States* v. *Standard Oil of California, supra*, p. 6.

(d) The informer's privilege would apply only to persons who report violations of the law. See Webster's Unabridged New International Dictionary (2d ed., 1951), p. 1276; *United States* v. *Lorain Journal Co.*, N.D. Ohio, 10 F.R.D. 487, 488; *United States* v. *Shubert*, S.D.N.Y., F.R.D. 528, 536; *United States* v. *Krulewitch*, 2 Cir., 145 F. 2d 76, 78. There is no contention that there are any such persons in the instant case.

(e) If, however, plaintiff claims that some of the grand jury witnesses are true informers, those specific cases would have to be presented to and passed on by the Court. *United States* v. *Standard Oil of California, supra.*

For the above reasons, and the other reasons stated in the briefs and oral argument, plaintiff should be required

to disclose to defendants the grand jury transcripts not only of the testimony of the consenting witnesses but also of the testimony of all the witnesses.

[fol. 2175] TESTIMONY OF MR. SIDDALL

Disclosure of the testimony given by Mr. Siddall before the grand jury is supported by considerations equally strong but more immediate than those requiring the disclosure of the testimony of other consenting witnesses; for Mr. Siddall is confronted with a present examination on subjects about which he testified before the grand jury years ago. These subjects, relating to many discovery requests, search for many documents and delivery of a substantial number thereof, are detailed and complicated. The circumstances, as Your Honor recognized at the oral argument, differ radically from the simple factual situation Your Honor had in mind in stating that a witness is supposed to tell the same story every time he testifies.

Even though Mr. Siddall is a man of high character and fine memory, it is impossible for him to remember the details of testimony given three and one-half years ago. Also to be taken into account are changed conditions and additional information during the intervening period.

It would be unfair to require him to testify without having before him his previous testimony. He should not be forced to run the natural risk of conflicts—apparent or real—in his testimony, or be put at the disadvantage of explanation, when all this could be avoided by reference [fol. 2176] to his previous testimony. This is particularly true because his original testimony, taken under legal process, was without benefit of clarifying cross examination and because such testimony has been in the possession of the Government for three and one-half years.

In fairness, the Government should not be given the option in a trial or a deposition (a) of using exclusively the grand jury transcript of a witness for impeachment purposes in the event the witnesses' new testimony were less favorable to the plaintiff than it wished, or (b) of remaining quiet if the new testimony of the witness were favorable to plaintiff. It should not be a case of "heads the Government wins, tails the witness loses".

Rejection of such inequities seems to be the theme running through recent cases: the *Standard Oil of California* case, the pending *Grunstein* case, and even in the *Darling* case. We again quote from the *Rose* case in the Third Circuit (215 F. 2d 617, 630):

> "Since all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings."

The Siddall situation, involving an imminent deposition examination presents, of course, an immediate as well as a strong case for disclosure of grand jury testimony. Similar compelling reasons support defendants' request for [fol. 2177] access to the testimony of all witnesses who consent to disclosure. Furthermore, all the grand jury testimony is necessary to put defendants on a parity with plaintiff in the preparation of this case, and access to it should be granted the defendants for the several reasons stated herein and in our briefs and oral argument.

Addendum

We have just received a copy of the opinion, filed December 19, 1955, and the briefs, in *United States v. Ben Grunstein & Sons Company*, et al., D.N.J., Civil No. 888-51. Judge Hartshorne's decision, in that it grants access to the defendants of the grand jury transcripts of all witnesses who will testify, clearly supports access in this case to the grand jury testimony of Mr. Siddall, who has already testified and will again do so in this case.

The *Grunstein* case does not seem to cover either of the other two questions raised in the instant case. So far as appears, no request was made for transcripts of testimony of non-party witnesses who consent to disclosure.

Nor was any contention made or any facts adduced to the effect that the grand jury proceedings were used to [fols. 2178-2181] prepare a civil case, or that the complaint in the civil action and the statements of issues and answers to questions were based on grand jury information.

The full facts of the instant case, as contrasted with the *Grunstein* and other cases, particularly the continuous use by plaintiff in this case of the grand jury proceedings for civil purposes, present an ideal situation for clarification of the law on this important subject. Such clarification, we belive, woudl be of great benefit to the courts and the bar in connection with "Big Case" litigation.

December 22, 1955

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, By John A. Ackerman, 810 Broad Street, Newark, New Jersey. Richard W. Barrett, Dinsmore, Shohl, Sawyer & Dinsmore, 1218 Union Central Building, Cincinnati 2, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York, Attorneys for Defendant, The Procter & Gamble Company.

[fol. 2181a] [File endorsement omitted]

[fol. 2182] IN UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

[Title omitted]

SUPPLEMENTAL MEMORANDUM OF LEVER BROTHERS COMPANY IN SUPPORT OF ITS MOTION TO INSPECT AND COPY TESTIMONY OF WITNESSES BEFORE GRAND JURY—December 30, 1955

Introductory Remarks

This supplemental memorandum is a brief statement of points relative to the pending motions with particular reference to the following developments:

1. *United States* v. *Grunstein*. Judge Hartshorne has filed his opinion in *U. S.* v. *Grunstein*, Civ. No. 888-51, granting disclosure to the defendants therein "of so much of the minutes of the . . . Grand Jury testimony as includes that of (1) the defendants, who represent that they will take the

stand in their own defense, and of (2) any other witnesses before such Grand Jury, who will definitely take the stand at this trial, as soon as such fact definitely appears." Defendants' motion did not seek access to the testimony of persons who would not be called as witnesses. Judge Hartshorne nevertheless pointed out that defendants could examine such persons by deposition, and thereafter, if need arose, could apply to the Court for access to their Grand Jury testimony or for inspection thereof by the Court itself to ascertain whether it should in fairness be revealed to the defendants.

[fol. 2183] It will be noted that Judge Hartshorne's decision was rendered during the trial of a case involving a demand for damages under the False Claims Act, 31 U.S.C. §231 *et seq.* It was based upon considerations of fairness in light of the policy of the Federal Rules of Civil Procedure. The requested discovery was allowed even though the administrative considerations of the "Big Case" were not present and no question of *pre-trial* discovery was involved.

We hereinafter discuss the Grunstein opinion in detail.

2. *Plaintiff's refusal to disclose.* In the course of the argument on the Motions for disclosure of the transcripts of witness' testimony before the Grand Jury, the Court inquired whether the plaintiff objected to submitting an affidavit or statement showing the use that the plaintiff has made, and intends to make, of the Grand Jury transcripts in preparing for the trial of this case and in the trial itself. After consideration by the Department of Justice, counsel for the plaintiff has advised the Court that the Government declines to respond to the Court's inquiry. (McDowell's Letter to the Court, December 23, 1955).

This refusal by the executive branch of the Government to respond to the Court's inquiry is as pointless as it is distasteful. It merely underlines the fact that the Government has extensively used the transcript, and if demonstrates that they intend to use it in the future for preparation and to reserve all rights to make such use of it at trial as they may see fit.

We hereinafter discuss the Government's use of the Grand Jury transcript.

[fol. 2184] Discussion

I. The Government's Use of the Grand Jury Testimony.

1. *The Government has used the testimony to prepare the complaint.* This is demonstrated by:

a. The Chronology, which shows that the elaborate complaint was obviously prepared while the Grand Jury was sitting.

The complaint was filed December 11, 1952, two weeks and two days after the Grand Jury completed its hearings. The Thanksgiving holidays intervened.

b. The Department of Justice's press release issued when the complaint herein was filed states that "The filing of the complaint results from a careful and thorough investigation of the industry, *including extensive grand jury proceedings.*"

2. *The Government deliberately used the Grand Jury as an instrument of discovery for purposes of its civil proceeding:*—

a. Witnesses were called and testified before the Grand Jury shortly before its term expired. This indicates the probability that they were called solely for the purpose of obtaining discovery for civil purposes. For example: (1) Colgate official James A. Reilly (since deceased) testified on November 6, 1952, a little more than a month before the complaint was filed, and about 3 weeks before the Grand Jury was discharged. (2) Colgate's then president, E. H. Little, testified on November 18, 1952, about a week before the Grand Jury was discharged, and only a little over three weeks before the complaint was filed.

b. An affidavit of government counsel has stated that the Grand Jury investigation was for the purpose of investigating the facts and deciding whether proceedings should [fol. 2185] be instituted, either criminal or civil. (Smith affidavit, March 21, 1953).

c. This Court has found that the purpose of the grand jury proceeding was to investigate civil as well as criminal law violations (Opinion, May 11, 1955).

d. The use of grand jury proceedings for purposes of compelling production of data including the testimony of

witnesses, for purposes of a civil antitrust proceeding is an established, acknowledged procedure of the Department of Justice. See statement of Hon. Stanley N. Barnes, May 12, 1955, and other sources cited in Colgate's memorandum, pp. 13-19.

3. *The Government has used the testimony before the Grand Jury in the civil proceedings to date.*

a. The transcript of the Grand Jury proceedings has been in the files of the Antitrust Division in Washington. It has been available to and used by attorneys, accountants, investigators and others connected with the preparation of this case for trial. (See Plaintiff's Brief, p. 17; Transcript, pp. 86-89).

b. The affidavit of Joseph E. McDowell sworn to August 20, 1954, justifies demands for documents in the present civil proceedings on the basis of "substantial information . . . already . . . furnished . . . in the course of the investigation . . . conducted by the Department of Justice prior to the institution of this action." This undoubtedly refers in part at least to testimony before the Grand Jury. See Colgate Memorandum, pp. 4-5.

c. The Tentative Statements of Issues heretofore supplied to the defendants by the plaintiff refer to alleged [fol. 2186] events, conversations and transactions undoubtedly taken from testimony before the Grand Jury. See, for example, Government's Answer to Lever Question No. 17 and Colgate Question No. 8 Re Prices and Costs.

4. *The Government intends to use the testimony* before the Grand Jury in the future conduct of the case: *viz.*, in the selection of witnesses; in the review of their testimony before the witnesses take the stand in preparing responses to interrogatories, trial briefs, etc. The Government raises doubt as to whether it will be allowed to use the transcript to refresh or impeach witnesses (McDowell, transcript of argument, p. 105); but whether it uses the transcript in this fashion or not, it will undoubtedly use it in the course of preparing witnesses to testify at the trial.

[fol. 2187] II. In view of this use of the grand jury testimony, reasons of fairness and good administration of the

big case indicate that defendants should be furnished a copy.

1. *The testimony before the Grand Jury is an essential source of information to defendants.*

a. Colgate states that at least 28 witnesses testified before the Grand Jury (Colgate Memorandum p. 2).

b. This is a "conspiracy" case. The Government's Tentative Statement of Issues discloses that it intends to rely upon testimony as to alleged conversations. Presumably, this is based upon testimony before the Grand Jury.

c. Defendants are entitled to parity of information with the plaintiff. This is the policy of the Federal Rules of Civil Procedure. It also follows from the fact, as Judge Hartshorne pointed out, that the transcript of Grand Jury testimony is a "judicial" document. The Courts should not allow one party an advantage flowing from access to such a source, unless clear, countervailing policy considerations compel.

2. *Depositions are not an adequate substitute.*

a. At least one vital witness before the Grand Jury is deceased: James A. Reilly, then executive vice president of Colgate in charge of soap sales.

b. The only person connected with Lever who testified before the Grand Jury were separated from the company or resigned prior to their testimony and are not connected with Lever directly or indirectly. For the past 3 years they have been engaged in occupations or enterprises not connected with the soap business.

c. Colgate states that only 9 out of 28 Grand Jury witnesses known to it were officers or employees of the de- [fol. 2188] fendants at the time of their testimony. Ten were never connected with the defendants. Nine were apparently former officers or employees (a category which always raises possibilities of surprise, animus or the like).

d. All witnesses testified more than 3 years ago. Calling such witnesses to testify in depositions at this time, concerning the extremely complicated economic facts and business transactions here involved, would certainly be unsatisfactory as well as expensive, time-consuming and dilatory.

3. *Administration of the "Big Case" requires that defendants have access to the testimony before the Grand Jury.*

a. The plaintiff's past and prospective use of the testimony of witnesses before the Grand Jury makes it inevitable that unless defendants are apprised of this evidentiary material, their preparation will be inadequate. They will necessarily seek adjournments in the course of the trial because of surprise.

b. There is no adequate way for defendants to be advised of this material except by access to the testimony before the Grand Jury.

c. The actual trial will necessarily be delayed, disfigured and complicated by controversy as to the Grand Jury transcript. If the Government attempts to use it at trial for purposes of refreshing recollection, impeachment or admissions, controversy is inevitable. *If the Government attempts to use it at trial for purposes of refreshing recollection, impeachment or admissions, controversy is inevitable.* If the Government merely uses it to prepare wit- [fol. 2189] nesses in advance of their testimony, controversy will also result. In any event, the burden on the Court and the parties will be great (cf. the use on 90 occasions of Grand Jury testimony in *Socony-Vacuum*, 310 U.S. 150 (1940); cf. the practice by which the trial judge is burdened with the necessity of reading the transcript). In addition, the trial will not develop the facts with the clarity and completeness necessary for the Big Case.

d. The preparation of the case and the bringing of it to trial will be long delayed and its expense vastly increased. Defendants will be forced to take elaborate and numerous depositions at widely separated places throughout the nation. Each will require a great deal of time to suit the convenience of all counsel, to permit examination by all counsel and to explore the facts.

e. If the government intends to take depositions of witnesses who testified before the Grand Jury, these will be delayed and complicated (cf. the difficulties *re* Siddall's deposition).

f. Without complete mutuality of information and parity between the parties, there is little possibility of stipulation

of facts. Fact stipulations are almost indispensable in the trial of the Big Case.

III. Judge Hartshorne's opinion in United States v. Grumstein is a practical application of the rule upon which defendants rely in the present case: that is, that were considerations of fairness and efficient administration show good cause for giving access to the testimony of witnesses before a grand jury, upon motion of defendants in a subsequent civil action after termination of the Grand Jury [fol. 2190] functions, the court will require that they be furnished with a copy.

We shall first analyze Judge Hartshorne's opinion, and then apply it to the special situation of the present case.

1. *Judge Hartshorne's opinion sets forth the following conclusions:*

a. The basic issue is to coordinate the full discovery policy of the Rules and the traditional policy as to secrecy of Grand Jury proceedings.

b. Disclosure of Grand Jury testimony is wholly proper after its functions are ended, "where the ends of justice require it".

c. "The ends of justice" clearly call for disclosure to defendants of what plaintiff knows of this testimony. The issue is how far the so-called policy of secrecy countervails this.

d. The traditional policy of secrecy basically applies to deliberations and actions of the Grand Jurors, which are not here involved.

e. The reasons for secrecy in *United States* v. *Rose*, 215 F. 2d 617, 628 (3d Cir., 1954) do not apply. The third reason, to prevent witness-tampering, is academic. The Federal Rules involve complete disclosure on the theory that the danger of witness-tampering is not as great as the disadvantage of surprise. The fourth reason, to encourage free disclosures before the Grand Jury, should not shield a person who testifies at trial from disclosure of prior statements. The witness must tell the truth and the whole truth, including prior relevant statements. Any other rule would be an invitation to perjury or to partial disclosure.

[fol. 2191] f. The Grand Jury is an arm of the Court, not of the Government in its capacity as plaintiff. The Court "should treat the parties alike in their rights to relevant testimony."

g. As to persons who will not be called as witnesses at the trial [which was not included in the motion in *Grunstein*] there is no "necessity, as far as defendants here are concerned" for the production of their testimony. "This is because, if they are not called, then plaintiff Government has not taken unfair advantage of its knowledge of the nature of their Grand Jury testimony . . ." Defendants may obtain a list of witnesses from plaintiff and examine them personally or by deposition. If necessary, they may then apply to the Court for access to their testimony.

2. *Judge Hartshorne's opinion, applied to the present case, supports the following conclusions:*

(1) It squarely indicates that plaintiff should be ordered to furnish defendants a copy of the Grand Jury testimony of any witnesses who are to be called at the trial by either plaintiff or any defendant.

(2) It clearly indicates, although it does not directly hold, that plaintiff should be ordered to furnish defendants a copy of the Grand Jury testimony of any consenting witness before the Grand Jury. See the paragraph beginning "Considering the defendants themselves", and especially the last following: "To the extent the defendants *desire* their own testimony, the sanctity of that which transpired before the grand jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of grand jury proceedings.' U.S. v. Rose, supra, at page 630." Similarly, to the extent that any witness consents, the sanctity of grand jury proceedings is not in question.

[fol. 2192] (3) The opinion indicates that the controlling criterion is whether access to the testimony is necessary so far as defendants are concerned: that where such "necessity" exists, the disclosure policy of the Rules overcomes the traditional policy of secrecy of grand jury proceedings properly understood. In *Grunstein*, the case was at an advanced trial stage where the defendants' need for portions of the transcript was limited to its use to counteract the

intended use thereof by the Government plaintiff to refresh memory. See the second paragraph of the opinion. Nothing more was asserted by the defendants as "cause" for their motion. Consequently, at the time of Judge Hartshorne's decision any need for the transcripts in *pre-trial* discovery was academic.

(4) Applying this standard to the circumstances of the present Big Case, we believe that defendants' motion for a copy of the transcript of the testimony of all witnesses should be granted. Our reasons are as follows:

(a) The testimony of all witnesses is presumably relevant. The Government has never otherwise contended. The Grand Jury was solely concerned with an investigation of the soap industry, all phases of which are directly involved in the comprehensive complaint herein (See Government's Press Release, December 11, 1952).

(b) Access to all of this testimony is necessary in fairness to the defendants, and in the efficient administration of this Big Case. As outlined above: (i) Defendants cannot otherwise be placed on a parity of information with the plaintiff. Depositions are inadequate. (ii) Unless defend- [fol. 2193] ants are fully informed, the date for trial will be delayed. Defendants will be required to resort to depositions, however unsatisfactory, which will require a great deal of time and be enormously expensive. (iii) The trial itself will be delayed, complicated and confused. As in the *Grunstein* case, adjournments will be required because of surprise. The Court will be confronted with requests to use, objections and demands for access to Grand Jury testimony. The possibility of stipulations will be decreased because defendants will not know the facts available to the plaintiff.

Necessity must, of course, be determined in light of the particular case in which the demand for access is made. "Necessity" includes the needs of the court to expedite and simplify the Big Case, as well as of the defendants. "Necessity" here, we submit, requires that the relevant evidence in the form of witnesses' testimony before the Grand Jury be furnished to defendants. There is no rule of law or reason against disclosure. It is to be granted or denied as "the ends of justice require". The Govern-

ment cannot retain exclusive use of this material merely because it is physically in its possession or because of fanciful and remote fears. It was this same adamant refusal to recognize the dictates of reason and fair play that caused the Government to deny to a defendant access to *his own* testimony before the Grand Jury, even when he was charged with perjury in that very testimony. *United States* v. *Remington*, 191 F. 2d 246 (CA 2, 1951); *United States* v. *Rose*, 215 F. 2d 617 (CA 3, 1954).

We respectfully submit that no consideration of public policy, and certainly no principles of law, override in the [fol. 2194] present case the clear desirability of providing the defendants with access to the evidentiary material in the form of Grand Jury testimony to which the plaintiff in this action has and has had access.

Respectfully submitted, Bailey, Schenck & Bennett, by (S.) Alexander Schenck, 744 Broad Street, Newark, New Jersey. Arnold, Fortas & Porter, by Abe Fortas, 1229 19th Street, N. W., Washington 6, D. C., Attorneys for Defendant Lever Brothers Company.

Dated: December 30, 1955.

[fols. 2194a-2195] [File endorsement omitted.]

[fol. 2196] In United States District Court for the District of New Jersey

[Title omitted]

Reply Memorandum in Support of Motion by Colgate-Palmolive Company for Disclosure of Testimony Before the Grand Jury—January 4, 1956

Statement

This memorandum is submitted pursuant to permission given by the Court at the argument on December 12, 1955. It deals primarily with two topics: (1) an analysis of the position taken by counsel for the plaintiff at the argument

and in a letter to the Court dated December 23, 1955, and (2) a discussion of the applicability to the present motions of the opinion filed December 19, 1955 in *United States* v. *Ben Grunstein & Sons Co.*, Civil No. 888-51, by Judge Hartshorne of this Court.

Point I

The plaintiff's policy of using grand jury testimony in this civil action is inconsistent with its arguments for secrecy.

In a letter to the Court dated December 23, 1955, a copy of which we received December 27, 1955, Joseph E. Mc-[fol. 2197] Dowell, Esq., counsel for the plaintiff, stated:

> "I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

This letter was in response to a question addressed by the Court to counsel for the plaintiff as to whether he objected to stating

> "(a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial." (Tr. 6-7)

The Court suggested that counsel might wish to consult the higher echelons of the Department before answering (Tr. 104), and this suggestion was accepted (Tr. 108).

At the argument, however, counsel for the plaintiff did address himself to the question to some extent, albeit with obvious reluctance (Tr. 95, 104-8). As to parts (a) and (b) he professed a personal inability to answer because of the fact that he had had no connection with the case until last year (Tr. 105). As to part (b), this is unresponsive; and the plaintiff cannot disclaim knowledge of the use it has made of the transcripts.

His answer to part (c) was this:

> "My own view—and I say this without prejudice, your Honor; I have given some consideration to it—

> my own view is that if the occasion should arise in the [fol. 2198] trial of this case where I would think that it might be appropriate or desirable to refer to a transcript of grand jury testimony, my view would be that question should be submitted to the Court for advice and ruling as to whether or not it would be appropriate." (Tr. 105)

At the conclusion of his statement, after saying that in some cases partial disclosure to the defendants resulted from references to the transcript made by the Government in argument, counsel for the plaintiff added:

> "And I have tried to be very careful not to say anything. I, too, could speculate at great length, the way the defendants do, about the use made here, but I think it is sufficient to point out that it is all speculation and I don't propose to enter into it. And I think, for that reason, the furnishing of such a statement as your Honor has suggested might raise some serious question here. And I would perfer to discuss that with my superiors." (Tr. 107-8)

This is the nature of the statement on which the plaintiff apparently now proposes to rely in answer to the Court's question.

It seems fair, therefore, to say that the plaintiff has now refused to state the use which it has made of the grand jury testimony in this civil action or the use which it will make of that testimony in the future. Further, it has given no reason for that refusal other than to state that it does not propose to enter into "speculation" about its own policies and activities.

[fol. 2199] In the absence of enlightenment from the plaintiff, the only possible source of knowledge, we are entitled to assume what all the surrounding circumstances show: that the plaintiff began the grand jury investigation with at least the partial intention of using the grand jury to gather facts upon which to base a civil action; that all or most of the testimony before the grand jury was taken for the sole purpose of discovery for a civil action; that the present civil action was based upon that discovery; that the fullest use of the grand jury testimony has been and

will be made by the plaintiff in preparation for trial of this action; and that the plaintiff proposes at the trial to make whatever use of the grand jury testimony it deems "appropriate or desirable", in the words of Mr. McDowell quoted above, subject to the "advice and ruling" of this Court. All these points were made in our briefs and oral argument, and the plaintiff does not deny any of them.

By adopting the position that it will make such use of the testimony at the trial as it deems "appropriate or desirable", the plaintiff has destroyed any argument that it has a claim of privilege or a position to speak in the public interest on the issue of grand jury secrecy.

At page 15 of its brief the plaintiff states that Rule 34 of the Federal Rules of Civil Procedure governs these motions. Under that rule, if the plaintiff has no claim of [fol. 2200] privilege, clearly it has no basis for opposing production of the grand jury testimony in its possession. The duty of the Court under or by analogy to Rule 6(e) of the Federal Rules of Criminal Procedure to balance the interest between grand jury secrecy when any of the reasons for it still remain and disclosure of testimony when the ends of justice require is a different matter, fully discussed in our main brief. But the plaintiff, as a party, has no basis other than privilege on which to oppose production. Good cause, burden, and the other usual Rule 34 problems have no relevance here, except as they relate to privilege. Nor can the plaintiff, as a party to a civil action, purport to act as an adviser to the Court on the public interest in the functioning of the grand jury system.

If the plaintiff were in a position to claim some sort of executive or governmental or public privilege or to advise the Court on the matter of grand jury secrecy in connection with such a privilege, its starting point would necessarily be the five reasons for grand jury secrecy enunciated in *United States* v. *Rose*, 215 F.2d 617, 628 (3d Cir. 1954).

There is only one of these reasons which counsel for the plaintiff mentioned during oral argument (Tr. 81-3) or which plaintiff's brief urges seriously (pp. 9-10) as a basis [fol. 2201] for withholding testimony. That is reason (4), which the Court in the *Rose* case stated as follows:

> "(4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; . . ." (215 F.2d 628)

We have discussed in our main brief the considerations which make this reason inapplicable here. The plaintiff, however, has pressed it. Thus counsel for the plaintiff on the oral argument said of witnesses before the grand jury:

> "If they are going to speak forthrightly at all, they will probably do so more easily if they feel that their testimony before the grand jury, as least, is secret.
>
> "Now, it is true, they may consent at some future date to the disclosure of their testimony. However, if a precedent is created, that it becomes generally known throughout the land that testimony before a grand jury may become public knowledge, that they may be asked to give their consent, they may withhold a little more from the grand jury than they otherwise might.
>
> . . . . . .
>
> "Now, this is a very real danger, disclosing transcript, even upon consent, when the consent could be obtained perhaps by pressures. This would make it virtually impossible for the Government to effectively discover anything about criminal conduct. And particularly this is true, we suggest, where the investigation is concerned with economic activity." (Tr. 82-3)

With the statement that the plaintiff itself will seek to use the transcript if "appropriate or desirable", this argument disappears. The plaintiff will seek to use the [fol. 2202] transcript with or without consent of the witnesses. Thus all the dire consequences of possible disclosure painted by counsel for the plaintiff already exist to the fullest extent. Witnesses cannot assume that their testimony will be secret forever. The Government claims the right to seek permission for disclosure when it is "appropriate or desirable".

We do not quarrel with the plaintiff's right to seek disclosure. The plaintiff's statement of position is fully in accord with the law as set out in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-4 (1940), citing 8 Wigmore, *Evidence* § 2362, and in *United States* v. *Rose*. As the Supreme Court stated "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

To picture, however, these dire consequences if witnesses know their testimony may be disclosed in a subsequent civil action on motion of the defendants, but none if on motion of the plaintiff, is fanciful. The fact is that when the grand jury has ceased to sit, no evil results will flow from disclosure of testimony, as Wigmore demonstrates in detail. The privilege of secrecy is temporary; and both the witness's privilege and the derivative privilege of the State in inducing testimony cease when the grand jury's function has ended.

[fol. 2203] The plaintiff's position shows that it has no real concern with grand jury secrecy as such, since it stands ready to end that secrecy when "appropriate or desirable". Its concern is to maintain its preferred position in civil cases in which it has used the grand jury to prepare by fostering an uncritical acceptance of the shibboleth of "secrecy". Unless the plaintiff will state that it has not used and will not under any circumstances use the grand jury testimony in the preparation or trial of the present civil action, it should be found to have waived any position it might otherwise have had to claim a privilege, whether in its own name or in that of the people.

An analogous situation arose in *Fireman's Fund Indemnity Co.* v. *United States*, 103 F.Supp. 915 (N.D. Fla., 1952). By motions under Admiralty Rule 32 libellant sought production of statements of all witnesses made to Naval investigators and testimony of all witnesses before a Navy Court of Inquiry convened to investigate the accident in question. The Secretary of the Navy filed in court a memorandum asserting privileged and confidential status of these records and declined to permit production, basing his claim on 5 U.S.C. § 22 and departmental regulations, just as the plaintiff does at pages 17-20 of its brief. The Court said:

> [fol. 2204] "Where such action is justified, however, in cases in litigation, it is as applicable to the government counsel as to others. During the course of the argument in these cases the court gained the impression that the Navy had already furnished proctor for respondent with all the documents which proctor for libellant seeks authority to inspect and copy or photograph. If this is true, these documents have lost their

privileged and confidential status. Pacific-Atlantic S. S. Co. v United States, 4 Cir., 175 F.2d 632.

"The motions filed in these cases make a showing of good cause for the inspection of the documents requested by proctor for libellant. The vessel on which this accident occurred was owned by the United States and completely in charge of Navy personnel. Practically all the evidence pertaining to the accident is contained in the records demanded by proctor for libellant and not otherwise available to him in his preparation of these cases for trial. To furnish these records to proctor for respondent for use by him in defending these cases and declining to make them available to proctor for libellant for use by him in his preparation of the cases for trial would be an act on the part of the Secretary of the Navy that would obstruct the administration of justice under law and should not be countenanced by any court." (103 F.Supp. 915-6)

Any records furnished to proctor for respondent were ordered produced. See also *Bank Line, Ltd.* v. *United States*, 76 F.Supp. 801 (S.D. N.Y. 1948), and *Bowles* v. *Ackerman*, 4 F.R.D. 260 (S.D. N.Y. 1945).

Apart from these considerations, it is plain that the plaintiff's attorneys have not pursued the procedure required for a claim of privilege by the Government. This procedure is laid down in *United States* v. *Reynolds*, 345 [fol. 2205] U.S. 1 (1953), a case under the Tort Claims Act upon which the plaintiff has placed major reliance, both in its brief (pp. 20, 24) and in oral argument (Tr. 92-3). If the plaintiff purports to claim a governmental privilege, or to advise this Court on how to preserve the function of the grand jury in future cases, it must do so on a basis no higher than that of preserving state secrets. We do not think an analogy to state secrets is appropriate, inasmuch as the Court rather than the plaintiff is under Rule 6(e) the designated protector of the grand jury. The plaintiff, however, can purport to claim a privilege (Tr. 88), or to ask for withholding in the public interest (Tr. 86), or to claim a privilege on behalf of the people (Tr. 89) only on the basis of some such analogy. The Supreme Court has made it plain, however, that such a claim of privilege, even

when military or state secrets in the strict sense are involved, cannot be taken lightly:

> "Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, *lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.* The court itself must determine whether the circumstances are [fol. 2206] appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." (345 U.S. 7-8; emphasis added)

In view of a formal claim of privilege by the Secretary of the Air Force and the fact that there was "nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident" (345 U.S. 11), the Court sustained the privilege.

Here there has been nothing resembling a formal claim of privilege by the Attorney General. Indeed, it will be noted that the letter to the Court of December 23, 1955, unlike all prior letters in this action, was signed by the plaintiff's trial attorney rather than by the Assistant Attorney General in charge of the Antitrust Division. There is, therefore, no indication that this question has been considered either by the Attorney General or the Assistant Attorney General.

We do not say that a formal claim of privilege should have been made or would have been appropriate. The failure to make it, however, shows the plaintiff's own realization that no executive privilege is involved. The plaintiff is not and cannot be before this Court on this motion as one claiming an executive privilege or one purporting to

speak for the general public interest in the preservation of the grand jury system.

[fol. 2207] Only the Court can speak as to what justice requires. Whether disclosure might in some way inhibit the function of the grand jury which has been discharged, or of future grand juries, is a matter for the Court's discretion. The views of counsel for the plaintiff as to what is good or bad for the public can be regarded as no more than lawyers' arguments. They appear here only as attorneys for a civil litigant seeking in this civil action to retain a procedural advantage not contemplated by the Federal Rules of Civil Procedure.

Wigmore, § 2362 says that the temporary secrecy of testimony "ceases when the grand jury has finished its duties . . .". The Supreme Court in the *Socony-Vacuum* case, citing Wigmore, said that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it" (310 U.S. 233-4). In *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), the Supreme Court said that "deposition-discovery rules are to be accorded a broad and liberal treatment . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." The inevitable conclusion would seem to be that the reasons for secrecy of testimony have ended and that disclosure in this civil action is required. Certainly the plaintiff's use of the grand jury testimony disarms it from arguing to the contrary.

[fol. 2208]

Point II

The decision in *United States* v. *Ben Grunstein & Sons Co.* supports the granting of the present motions.

United States v. *Ben Grunstein & Sons Co.*, in which an opinion was filed December 19, 1955 by Judge Hartshorne, is an action for damages brought by the United States under the False Claims Act, 31 U.S.C. §§ 231 *et seq.* The subject matter is alleged fraudulent sales of meat by a packing company and eight other defendants to the armed forces. A previous grand jury investigation resulted in an indictment filed in 1951 against the packing company and one of the individual defendants and several other persons, which also referred to all of the current civil

defendants as parties to the conspiracy which was both the subject of the indictment and a part of the current civil action. The two current defendants indicted pleaded guilty on one count and were sentenced; and the balance of the proceedings under the indictment have long since been terminated.

The defendants in the civil action sought disclosure of the grand jury testimony of each of the nine defendants and of any other witnesses who are to testify in the proceedings on the part of either the plaintiff or the defendants.

The Court pointed out the broad discovery policy of the Federal Rules of Civil Procedure "consistent with [fol. 2209] recognized privileges", as expressed in *Hickman* v. *Taylor*. One of these privileges was found to be "that of the grand jury as a public institution, as well as of the witnesses that appear before it" (p. 3). The grand jury's function having ended, the question thus was found to be whether "the ends of justice require" disclosure, in the language of *United States* v. *Socony-Vacuum Oil Co.* The Court said:

> "Looking at the parties themselves, the ends of justice would clearly call for a discovery of what plaintiff knows of this relevant testimony, to defendant, in order that the parties may be placed on a parity. So we turn to the question as to how far the above policy of secrecy, for the protection of both the public and the witnesses, countervails this unbalanced situation between the parties themselves." (p. 4)

The Court then quoted the five traditional reasons for secrecy from *United States* v. *Rose*. Only reasons (3) and (4) were deemed applicable, the grand jury's functions having terminated. Reason (3), relating to subornation of perjury, was held inconsistent with the Federal Rules of Civil Procedure. There remained reason (4), relating to encouraging free disclosure of witnesses. The Court said:

> "On the other hand, the privilege attending such witnesses, both for their own benefit and that of the body politic, should not go so far as to invite possible per-

jury. This would be the case were any such witness, from that very fact, to be free from any possible later inquiry as to his testimony before the Grand Jury in that regard." (pp. 6-7)

[fol. 2210] The defendants had all stated that they would take the stand. This fact the Court held to waive any possible claim of privilege on their behalf:

"For no witness before a Grand Jury can possibly expect, for similar reasons, that if he is later a witness in either a criminal or civil proceeding, based on the very transaction to which he has testified before the Grand Jury, that he will not be asked what he has previously admitted to be the fact concerning that transaction, whether on the street, in court, or before the Grand Jury. Thus such discovery will not unduly discourage 'free and untrammeled disclosures' by witnesses to Grand Juries. Thus there is no sound objection to such discovery, necessary as between the civil parties, on the ground of protection of the individual witness or of the public." (pp. 7-8)

To the extent that the defendants desired their own testimony the Court held the sanctity of the grand jury was hardly in question, citing *United States* v. *Rose*.

"In short, any defendant in these civil proceedings, or any other witness before the Grand Jury in this regard, who will definitely take the stand as a witness in the case at bar, should have disclosed to the defense his testimony before the Grand Jury in that regard." (p. 8)

Thus the defendants were granted what they sought, as the Court again stated in its conclusion (p. 12).

The following statement is of particular interest with regard to the plaintiff's claim of privilege, discussed in Point I:

[fol. 2211] "Here it should be noted that the Grand Jury is an arm of the Court, not an arm of the plaintiff, the United States Government, which in the present civil case is acting through, not the Court, but its execu-

> five arm, the Department of Justice. 'The Constitution itself makes the Grand Jury a part of the judicial process * * *. The proceedings before a Grand Jury constitute "a judicial inquiry". * * *' Cobbledick v. U. S., 309 U.S. 323, 327 (1940). It therefore follows that, strictly speaking, defense is here seeking disclosure, not from plaintiff, but from the Court itself, which obviously should treat the parties alike in their rights to relevant testimony. It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by *Hickman; supra.*" (p. 8)

The Court then discussed the question of witnesses before the grand jury whom it was not known would be called in the civil proceeding. The names of these witnesses could have been discovered by demanding a list of witnesses known to the plaintiff who know the facts relevant to the case at bar.

> "This list would of course includes the names of all the witnesses in that regard before the Grand Jury. Then defendants, by examining these witnesses personally, or on deposition, can ascertain from them the very evidence they gave the Grand Jury. Indeed, after taking such discovery, if there is any real question still, for any unusual reason, as to what such witness may have told the Grand Jury, defendants can then apply to the Court, either to obtain a copy of such testimony for themselves, or perhaps better still, to have the Court itself inspect same, to see if same should, in fairness, be revealed to them." (p. 9)

[fol. 2212] In view of this ready remedy the limited privilege should be preserved and no "good cause" for the additional remedy of disclosure is shown. If, however, these witnesses are ultimately called, their grand jury testimony should be given to the defendants, and if surprise is involved, further examination of these witnesses by the defendants should be deferred to permit proper use of the minutes for impeachment or rehabilitation (pp. 10-11).

It is only at this last point that the *Grunstein* opinion might be argued to run counter to the granting of the pres-

cut motions. However, the differences between that case and the present one make the formula there prescribed for witnesses before the grand jury not known to be slated to testify at the trial inadequate here.

(1) The question before the Court did not really involve such witnesses. Only those who were to testify were covered by the defendant's requested relief, and the Court granted full relief as to them. In the present case, general discovery is sought, not merely testimony of witnesses at the trial for purposes of examination.

(2) The grand jury had not been used there, as here, for the very purpose of civil discovery. Thus the deliberate use of the grand jury as a private fact-gathering body in contravention of the aims of the Federal Rules of Civil Procedure was not present.

[fol. 2213] (3) The *Grunstein* case presumably involved a fairly specific set of transactions. The present case, on the other hand, is a sprawling affair taking in all aspects of the history of a major industry for 25 years. There it might well have been practicable by deposition to reproduce grand jury testimony, although the question arises as to why that effort should be made when the possibility of secrecy of grand jury testimony is eliminated thereby. Here a reproduction of the grand jury testimony is impossible, the scope of examination being so great. The burden is tremendously enhanced. The confusion produced by multiple transcripts is greater, and the possibility of delay through surprise at the trial is greater. The present case is a "big case" in the true sense of the term. Simplification of pretrial procedures and avoidance of adjournments at the trial such as the *Grunstein* opinion appears to contemplate are important here far beyond the ordinary case.

Under the reasoning of the *Grunstein* opinion the defendants here could obtain from the plaintiff a list of all witnesses with knowledge, which would include all grand jury witnesses. They could then take the depositions of all these witnesses and as to such as appeared before the grand jury secure their best recollection of their grand jury testimony. [fol. 2214] This would clearly destroy any secrecy of the grand jury proceeding. Then, if the testimony appeared to be favorable, the defendants could call any of these witnesses they chose at the trial, and upon announcing their

intention to do so could then secure the grand jury testimony. Equally, at such time as the plaintiff indicated any of these witnesses would be called, the defendants could secure their grand jury testimony. In a case already as vast and formless at the present one, no good and much harm would seem to flow from such a roundabout procedure.

(4) In the *Grunstein* case the question of consenting witnesses other than the defendants was not raised. However, the discussion appears to support the thesis that the privilege, such as it is, is that of the witness. Thus the Court said:

> "Considering the defendants themselves, their counsel have expressly represented to the Court that they will each and all take the witness stand on their own behalf in the present trial. Such being the case, that very action waives any possible claim of privilege on their own behalf, as to what they may have testified to in that regard before the Grand Jury: For no one can be permitted to testify only in part, as to what he has said or done, in regard to a particular transaction." p. 7)

Equally it would appear competent for a witness to waive whatever privilege he might have by some other voluntary act and thus make his testimony available.

[fol. 2215] The Court has asked counsel the present status of *Herzog v. United States*, 75 Sup. Ct. 349 (1955). The Ninth Circuit Court of Appeals has confirmed the conviction for attempted income tax evasion, 226 F. 2d 361 (9th Cir. 1955) in an opinion reported in the December 12, 1955 advance sheets. The question of inspecting grand jury testimony of hostile witnesses was discussed without allusion to Mr. Justice Douglas's opinion in connection with granting bail. While recognizing the power of a court under Rule 6(e) to order grand jury minutes produced for inspection where there is a clear showing that the ends of justice require, the Court found that no foundation for inspection had been laid and that accordingly such inspection would have constituted a "fishing expedition". It would appear that the question could come before the Supreme Court only if a petition for certiorari on this point were now filed and granted.

The *Herzog* and *Grunstein* cases afford a useful distinction between criminal and civil cases. In civil cases, as the Supreme Court stated in *Hickman* v. *Taylor*, a "fishing expedition" is the proper procedure. In criminal cases it is not, as the Court held in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951). Whether Mr. Justice Douglas or the Supreme Court would agree with the Ninth Circuit Court of Appeals as to what constitutes a fishing expedition [fols. 2216-2217] might have no application in a civil action. As the *Bowman Dairy* case shows, grand jury secrecy will not forestall applicability of the appropriate discovery rules to criminal cases. The *Grunstein* opinion applies the appropriate discovery rule in a civil case by allowing disclosure as to witnesses who will testify at the trial, the only question before the Court.

This is not the limit of civil discovery, however, under the express language of the Federal Rules of Civil Procedure. Rule 26(b), whose scope governs Rule 34, provides:

> "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Where the question of general discovery of all the grand jury testimony is presented in the circumstances of the present case, the reasoning of the *Grunstein* case and the authorities discussed there lead to the conclusion that such discovery should be granted.

Respectfully submitted, O'Mara, Schumann, Davis & Lynch, By Edward J. O'Mara, A member of said firm. Cahill, Gordon, Reindel & Ohl, Attorneys for Defendant Colgate-Palmolive Company.

Of Counsel, Mathias F. Correa, Jerrold G. Van Cise, James B. Henry, Jr.

January 4, 1956.

[fol. 2217a] [File endorsement omitted]

[fol. 2218] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

BRIEF OF THE PROCTER & GAMBLE COMPANY IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND FOR RULING ON CLAIM OF PRIVILEGE—May 14, 1956

In answer to the plaintiff's motion for reconsideration and claim of privilege, filed on May 3, 1956, it seems sufficient to say that:

All the contentions now made by plaintiff have heretofore been fully presented to and considered by the Court. The Court has been exceedingly liberal in permitting views to be presented by all parties—at some length—and has given these contentions full consideration and rendered a comprehensive opinion with respect to them.

[fol. 2219] The so-called "Claim of Privilege" was fully covered by the plaintiff in its previous written and oral presentation to Your Honor. In addition, the claim was again specifically called to Your Honor's attention by plaintiff in sending you on April 5th a copy of an almost identical claim of privilege by the Attorney General filed in Civil No. 11584-C in the District Court for the Southern District of California. The plaintiff in its letter of April 5th specifically described this California claim as being "based on the same grounds urged by counsel for the Government in the motions now pending" before this Court. Both of these privilege claims were presented to and given full consideration by Your Honor prior to your decision and opinion, and now plaintiff is seeking to present the same argument a third time.

Likewise, none of the citations in plaintiff's motion adds anything to the authorities fully presented to the Court prior to the delivery of its opinion. All but three of them were previously cited in the original briefs, supplemental papers or argument.

One of these three, *Schmidt* v. *United States*, 6 Cir., 115 F. 2d 394, merely involved an unauthorized interrogation of grand jurors. Furthermore, the Court in that case in [fol. 2220] effect supported Your Honor's opinion by saying (p. 397):

> "Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry

should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its 'judicial inquiry'."

Another of the cases, *United States* v. *Schneiderman*, S.D. Cal., 104 F. Supp. 405, related largely to disclosure of identity of informants under the limited discovery provisions of the criminal rules and referred briefly to the general policy of secrecy of Grand Jury proceedings. In that case there was no issue as to, nor any discussion of, disclosure of Grand Jury transcripts where, as in this case, the interest of justice required it.

The third citation, 4 *Moore's Federal Practice* (2d ed.), pp. 1175-6, does not relate to Grand Jury transcripts but merely to governmental privileges not asserted here. On the general question of "privilege", Moore specifically states that the Courts, after giving consideration to the Government's views (as was certainly done in this case) should determine the question of disclosure. Illuminatingly, Professor Moore adds that the Government, when a party, "cannot assert any absolute privilege against discovery * * *; it cannot make charges against a party and then [fols. 2221-2224] refuse to let him know the basis of the charges". This is substantially the effect of Your Honor's opinion.

It is submitted that this Court should deny plaintiff's motion for reconsideration and, in accordance with its opinion, sign the order tendered by Procter on May 2, 1956.

Dated: May 14, 1956.

Respectfully submitted, Toner, Crowley, Woelper & Vanderbilt, by Robert A. Vanderbilt, 810 Broad Street, Newark, New Jersey. Richard W. Barrett, per Dinsmore, Shohl, Sawyer & Dinsmore, 12th floor Union Central Building, Cincinnati 2, Ohio. Kenneth C. Royall, Dwight, Royall, Harris, Koegel & Caskey, 100 Broadway, New York 5, New York. Attorneys for defendant, The Procter & Gamble Company.

[fol. 2224a] Service of a copy of the within Brief is hereby acknowledged this 14th day of May, 1956.

George J. Rossi, Assistant United States Attorney.

[File endorsement omitted]

[fol. 2225] In United States District Court for the District of New Jersey

[Title omitted]

Brief of the Defendant, Association of American Soap & Glycerine Producers, Inc., in Opposition to Plaintiff's Motion for Rehearing and Claim of Privilege

Motion for Rehearing

Plaintiff does not state any ground for rehearing in this case. Every point made in its motion was raised in its previous brief and fully argued before the Court. The briefs of Defendants were extensive and practically an entire day was spent in argument before this Court.

The Claim of Privilege

Plaintiff's claim of privilege is the same as heretofore made. Therefore, we will advert to it only briefly.

The claim states (1) that the Attorney General has a joint responsibility with the Courts to protect the integrity of the Grand Jury processes, and (2) that the Department of Justice holds the transcripts of Grand Jury testimony as a trustee for the benefit of the public. We submit that neither point is well taken.

[fol. 2226] *Grand Juries are a Part of the Judiciary—one of the Three Coordinate Branches of the Government.*

1. The Grand Jury has for centuries been a part of the judiciary (28 CJ 763). The Constitution recognizes it as a part of the judiciary—one of the three coordinate branches of Government provided by that document (Constitution Amendment V). The Supreme Court in *Cobbledick* v. *United States*, 309 U.S. 323, 327, says:

> "The Constitution itself makes the Grand Jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the Court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a Grand Jury constitutes 'a judicial inquiry' (*Hale* v. *Henkel*, 201 U.S. 43, 66) of the most ancient lineage."

The Court in *United States* v. *Smyth*, 104 Fed. Supp. 283, 291, states:

> "The Grand Jury is an arm or agency of the Court by which it is appointed."

On December 19, 1955, the District Court for the District of New Jersey filed its opinion after a hearing on an application for discovery of Grand Jury minutes (*United States of America* v. *Ben Gaunstein and Sons Company, et al.*, 137 Fed. Supp 197). There the Court said:

> "Here it should be noted that the Grand Jury is an arm of the Court, and not an arm of the plaintiff, the United States Government, which in the present civil case is acting through, not the Court, but its executive arm, the Department of Justice. The Constitution itself makes the Grand Juries a part of judicial processes. * * * The proceedings before a Grand Jury constitute 'a judicial inquiry.' * * * (*Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940). It therefore follows that, strictly speaking, defense is here seeking disclosure, not from plaintiff but from the Court itself, which obviously should treat the public alike in their rights to relevant testimony."

[fol. 2227] In *United States* v. *Wells* (D. Idaho 1908) 163 Fed. 313, 325, the Court said in part:

> "'It is proper in this connection to keep in mind the fact, already noticed, that the only valid basis on which the institution of Grand Juries rests is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the Courts to refuse to tolerate any practice which conflicts with this independence and impartiality. * * * The purpose of the institution of Grand Juries was, as we have seen, to interpose a check upon the sovereign; and they would cease to answer this purpose, and would increase the danger they were intended to avert, if they should be put under the official direction of the prosecuting authorities of the state.'"

In *In Re National Windowglass Workers* (Northern District Ohio 1922) 287 Fed. 219, 225, the Court says:

> "A Grand Jury has no existence aside from the Court which calls it into existence, and upon which it is attending. A Grand Jury does not become, after it is summoned, impaneled and sworn, an independent planet, as it were, in the judicial system, but still remains an appendage of the Court on which it is attending. * * * It is and remains a Grand Jury attending on the Court, and does not, after it is organized, become an independent body, functioning at its uncontrolled will, or the will of the district attorney or special assistant."

In *Schmidt* v. *United States*, 115 Fed. 2nd 394, 397, the Court says:

> "Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the Court, *of which the Grand Jury is a part*, and under the general instructions of which it conducted its 'judicial inquiry.'" (Emphasis supplied.)

See also:

Application of Texas Co., 27 Fed. Supp. 847-850;
Hoffman v. *United States*, 341 U.S. 479, 485;
Hale v. *Henkel*, 201 U.S. 43, 59.

[fol. 2228] Some decisions state expressly that the Court *alone* has the jurisdiction or power to remove the veil of secrecy of Grand Jury proceedings. In *United States* v. *Byoir*, 58 Fed. Supp. 273, the Court said:

> "What was done here is evidence and may be advantaged by either party, having in mind, of course, the question of the secrecy of the Grand Jury proceedings. And the only jurisdiction over such matters is in this Court * * *. The veil of secrecy may be torn asunder in the interest of justice, and such lifting is within the jurisdiction of the Court empanelling the Grand Jury, and also within its sound discretion."

See also:

United States v. *Alper*, 156 Fed. 2d 222;
United States v. *National Wholesale Druggists' Association*, 61 Fed. Supp. 590.

The Rules of Criminal Procedure provide that the Court shall order one or more Grand Juries to be summoned at such time as the public interest requires. The Court in *United States* v. *Smyth*, supra, states:

> "There are various methods by which the Court may exercise control. * * * The Judge may discharge a Grand Jury at any time for any reason or for no reason, and whether they have finished the matter in hand or not."

The Rules of Criminal Procedure seem clearly to recognize that control of Grand Jury records rests with the Courts. These rules provide:

> "Disclosure of matters occurring before the Grand Jury other than its deliberations and the vote of any juror may be made to the attorneys for the Government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

[fol 2229] If the Supreme Court in approving the Rules of Criminal Procedure had not been of the opinion that the transcript of testimony before a Grand Jury was within the

control of the Court, it most certainly would not have adopted or approved this rule.

Control of the Grand Juries Could not Constitutionally be Conferred on the Attorney General.

The above and many other decisions establish beyond question that the Grand Jury is a part of the judicial branch of the Government, that the Courts alone have constitutional power to protect the integrity of Grand Jury processes, and that the Attorney General is not invested with any power in that regard. We have not found any decision of the Federal Courts holding that the Court to which a Grand Jury is attached is without power to give a party to litigation in that Court access to the transcript of testimony before a Grand Jury of that Court when the Judge is of opinion that such access would be in the interest of justice. The decisions are all to the effect that such access is discretionary with the Court.

To hold that the responsibility for access to Grand Jury records is a joint responsibility of the Court and the Attorney General would be to transfer in part to the executive branch of the Government that responsibility which the Constitution lodges solely with the Courts. The Attorney General, his assistants, and the district attorney may come into Court in a case to which the United States is a party and advance arguments with respect to the adverse effect on the public interest of permitting access to such transcripts. When any of these persons do come into Court representing the Government, they are, for the time being, officers of the Court.

In *United States* v. *Smyth* 104 Fed. Supp. 283, 291, the Court says:

> [fols. 2230-2231] "The United States Attorney, his assistants, the United States Marshal and his deputies and bailiffs, appointed by him to guard their deliberations, and, modernly, the reporters who record the proceedings, are likewise officers of the Courts."

The power to control the transcript of testimony and other records of Grand Jury proceedings is clearly in the Court to which the Grand Jury is attached, since the Con-

stitution manifestly places the Grand Jury as a part of the judiciary.

Since when, we might ask, has the executive branch of the Government become a better judge of public policy or public interest than the Courts? The books contain hundreds of decisions of the Courts based on public policy. For years the Courts have determined whether public policy requires that access to Grand Jury records be given or withheld and, we submit, that they are still competent to do so.

It is questionable whether Congress itself could enact a valid law transferring control of transcripts of testimony before Grand Juries, or any part of such control, to the Attorney General. Such transfer would, we believe, violate the Constitution.

Respectfully submitted, McCarter, English & Studer, By Augustus C. Studer, Jr., Member of the Firm, 11 Commerce Street, Newark, New Jersey. Adrien F. Busick, James T. Welch, Davies, Richberg, Tydings & Landa, 1000 Vermont Avenue, N. W., Washington, D. C. Attorneys for Defendant, Association of American Soap and Glycerine Producers, Inc.

[fols. 2231a-2232] [File endorsement omitted]

[fol. 2233] In The United States District Court For The District Of New Jersey

[Title omitted]

Memorandum Of Lever Brothers Company In Opposition To Plaintiff's Motion For Reconsideration And For Ruling On Claim Of Privilege

Plaintiff's Motion For Reconsideration and For Ruling on Claim of Privilege is predicated on the fact that "the Attorney General * * * has filed with this Court a formal Claim of Privilege asserting the privileged status of said transcripts of Grand Jury testimony".

This claim of alleged privilege, however, has already been before this Court and received its thorough consideration. In its brief, filed with the Court on December 7, 1955, Plaintiffs set forth as Point III the proposition "Transcripts of Grand Jury testimony are protected against production by the exception accorded privileged documents under Rule 34." Under this proposition, the Department's brief argued at length that the Grand Jury transcripts were [fol. 2234] subject to a claim of privilege by the Attorney General. There would appear to be no difference between the contention advanced in that brief and those brought forward by the present motion for reconsideration except that the present claim is now characterized as "formal". But nothing of substance is added by styling as "formal" a claim previously made informally. The present motion, therefore, brings forward no genuinely new matter for the Court's consideration.

The truth is that the Attorney General has no privilege touching Grand Jury transcripts. The Grand Jury historically developed as an arm of the Court, and its proceedings and the conduct of parties before it have traditionally been subject exclusively to judicial control. This control has now been codified in Rule 6(e), F.R.C.P., which provides that

> "Otherwise a juror, attorney, interpreter, or stenographer may disclose matters occurring before the Grand Jury only when so directed by the Court preliminarily to or in connection with a judicial proceeding * * *".

Indeed, *In Re Bullock*, 103 F. Supp. 639, (D.C. 1952), on which the Department purports to rely, completely refutes the notion that the Attorney General has any privilege respecting Grand Jury minutes. There the District Attorney was required to obtain the permission of the Court before disclosing the transcripts because, as the Court observed (p. 641), the Federal Courts "may remove the seal of privacy from Grand Jury proceedings *when in the Court's discretion the furtherance of justice requires* [fol. 2235] *it.*" (Emphasis in original).

Motions for reconsideration have never been favored. As Mr. Justice Bradley, speaking from the bench of the Supreme Court, once observed

> "This custom of making motions for a rehearing is not a custom to be encouraged. It prevails in some States as a matter of ordinary practice to grant a rehearing on a mere application for it, but that practice we do not consider a legitimate one in this Court. It it possible that in the haste of examining cases before us, we sometimes overlook something, and then we are willing to have that pointed out, but, to consider that this Court will reexamine the matter and change its judgment on a case, it seems to me, is not taking a proper view of the functions of this court . . . . ." (Charles Evans Hughes, *The Supreme Court of the United States* (1928), 71-72.)

Because of the lack of any genuinely new matter to support the Government's Motion and because of the well-established judicial policy against granting reconsideration in the absence of such new matter, we respectfully submit that the Plaintiff's Motion for Reconsideration should be, in all respects, denied.

Respectfully submitted, Bailey and Schenck, By Alexander T. Schenck, Raymond-Commerce Building, Newark, New Jersey. Abe Fortas, Arnold, Fortas & Porter, 1229 19th Street, N.W., Washington, D.C., Attorneys for Defendants, Lever Brothers Company.

Dated: ——, ——.

[fols. 2235a-2244] [File endorsement omitted]

[fol. 2245] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 609

UNITED STATES OF AMERICA, Appellant,

vs.

THE PROCTER & GAMBLE COMPANY ET AL

ORDER POSTPONING JURISDICTION—February 25, 1957

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

U. S. GOVERNMENT PRINTING OFFICE 1958 483888 913

Requiring the Government to disclose the grand jury transcripts to the defendants in this case would "subvert the functions of federal grand juries" just as much as the attempt to examine into the workings of a grand jury which this Court rejected in *United States v. Johnson*, 319 U. S. 503, 513, as an unwarranted "intrusion * * * into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty."[1] The implications of the decision below for the grand jury system are both profound and far-reaching, and they clearly call for review by this Court.

CONCLUSION

The question presented by this appeal is substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
JOSEPH E. MCDOWELL,
Attorneys.

DECEMBER 1956.

---

[1] In that case, the Court explicitly warned against devices which some of the states "have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes" (p. 513).

APPENDIX

United States District Court
District of New Jersey

Civil Action No. 1196–52

On defendants' motions to compel plaintiff to produce grand jury transcripts.

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Opinion

MODARELLI, District Judge.

A grand jury sitting in this district from May, 1951, until November 25, 1952, investigated possible violations of the anti-trust laws in the soap and synthetic detergent industry. The firms under investigation included the four defendants in this civil action: The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company, and The Association of American Soap and Glycerine Producers, Inc. No indictment was returned. On December 11, 1952, the United States filed its complaint in this action.[1]

[1] The action was commenced under § 4 of the Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. A. § 1 et seq., for alleged violations of § 1 (conspiracy in restraint of trade), and § 2 (conspiracy to monopolize any part of trade)

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 3 1956
JOHN T. FEY, Clerk

No. [redacted] 51

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
JOSEPH B. McDOWELL,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	3
Statement	3
The question is substantial	6
Conclusion	10

CITATIONS

Cases:	
Costello v. *United States*, 350 U. S. 359	6
Duncan v. *Cammell, Laird & Co.*, [1942] A. C. 624	8
Goodman v. *United States*, 108 F. 2d 516	7, 9
Hickman v. *Taylor*, 329 U. S. 495	6, 8
United States v. *Cotton Valley Operators Committee*, 339 U. S. 940	2, 9
United States ex rel. Touhy v. *Ragen*, 340 U. S. 462	9
United States v. *Johnson*, 319 U. S. 503	10
United States v. *Reynolds*, 345 U. S. 1	7, 8
United States v. *Rose*, 215 F. 2d 617	7, 9
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	7
United States v. *Wallace & Tiernan Co.*, 336 U. S. 793	2
United States v. *Yellow Cab Company*, 332 U. S. 218	2
Statutes:	
Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1, *et seq.*):	
Sec. 1	1, 2, 4
Sec. 2	1, 2, 4
Sec. 4	1, 3
Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, Sec. 2	2
Miscellaneous:	
Rule 26 (b), F. R. C. P.	4
Rule 34, F. R. C. P.	4, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey granting appellees' motions to compel production of grand jury transcripts (App., *infra*, pp. 11–~~34~~ 48), and denying the Government's motion for reconsideration (App., *infra*, pp. 49–54), are reported at 19 F. R. D. 122 and 247, respectively.

JURISDICTION

This suit was brought under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 4, commonly known as the Sherman Act, to enjoin violations of Sections 1 and 2 of that Act. The judgments

of the district court dismissing the complaint were entered on September 13, 1956, and the notice of appeal was filed in that court on October 4, 1956. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *Yellow Cab Company,* 332 U. S. 218; *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793; *United States* v. *Cotton Valley Operators Committee,* 339 U. S. 940.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTION PRESENTED

Following a federal grand jury investigation of possible criminal violations of the Sherman Act, in which no indictment was returned, the United States filed a civil suit under that Act. During pretrial proceedings, the district court directed the United States, over its objection and on pain of dismissal of the suit, to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who had appeared before the grand jury. When the United States refused to permit such inspection, the court dismissed the suit. The question presented is whether the district court erred in directing the Government to make such disclosure of the grand jury transcript.

STATEMENT

From May 1951 to November 1952, a federal grand jury sitting in New Jersey investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. No indictment was returned, but on December 11, 1952, the United States filed a civil suit under Section 4 of the Sherman Act, charging that since 1926 the three major soap companies[1] and

[1] The Procter & Gamble Company, Colgate-Palmolive Company and Lever Brothers Company.

a trade association have been engaged in a conspiracy to restrain and to monopolize trade and commerce in soap and synthetic detergents, and that the three manufacturing defendants have monopolized that trade, in violation of Sections 1 and 2 of that Act.

During pre-trial proceedings, each of the defendants filed a motion under Rule 34 of the Federal Rules of Civil Procedure for leave to inspect and copy the transcript of testimony of all witnesses who had appeared before the grand jury. The transcript was in the possession of the Attorney General. The Government opposed the request, but after argument the district court (Judge Modarelli) held, on April 17, 1956, that the defendants were entitled to inspect and copy the grand jury transcript. The court ruled that the defendants had shown "good cause" for the production of the transcript within the meaning of Rule 34[1] because (1) the Government was using the transcript to prepare its case; (2) the defendants would be aided by production; and (3) the defendants could not otherwise obtain the information. The court further held that none of the reasons commonly given for maintaining the secrecy of grand jury proceedings was applicable in the case.

---

[1] Rule 34 provides that, upon motion of any party "showing good cause therefor," the district court may order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, "not privileged," which constitute or contain evidence relating to any of the matters within the scope of the examination by deposition permitted by Rule 26 (b), and which are in his possession, custody or control.

On May 3, 1956, the Government moved for reconideration of that ruling. At the same time, it subitted a formal claim by the Attorney General that ne grand jury transcript ordered to be disclosed was rivileged. On July 9, 1956, the court denied reconideration on the ground that the Government had not resented any new contentions, but without discussing ne effect of the claim of privilege.

On August 21, 1956, the court entered an amended rder which provided that unless the United States n or before August 24, 1956, produced at the offices f the Department of Justice, and permitted each of ne defendants or their counsel to inspect and copy, all or any part of the aforesaid transcript of the estimony of witnesses who appeared before the Grand ury, the court will issue an order dismissing the omplaint herein."[3]

The United States did not produce the grand jury ranscripts for inspection and copying, and on September 13, 1956, the district court entered judgments ismissing the complaint as to all defendants.

[3] The court's original order, entered on July 24, 1956, affirmarely directed the United States to permit the defendants to spect and copy the grand jury transcript, but did not state the nsequences of noncompliance. The order was amended upon e Government's motion, which was based upon an affidavit by e Attorney General that it would be unseemly for the chief w enforcement officer of the United States to be placed in the lemma either of complying with a court order which he conlered erroneous and contrary to the public interest, or disobeying e order, in order to obtain appellate review thereof. Each fendant consented to the motion to amend.

THE QUESTION IS SUBSTANTIAL

The district court held that the Government, in a civil suit brought by it under the Sherman Act, is required to disclose to the defendants the transcript of prior grand jury proceedings. This ruling raises important questions of Federal law which bear directly upon the historic principle, only recently reaffirmed by this Court (*Costello* v. *United States*, 350 U. S. 359), that grand jury proceedings shall be conducted in secret and without subsequent exposure of the testimony taken.

1. The district court held that the defendants had shown "good cause" (within the meaning of Rule 34) for production of the grand jury transcript because (1) the Government was using the transcript to prepare its case; (2) the defendants would be aided by production; and (3) they could not otherwise obtain the information. The first two reasons given were plainly insufficient: the fact that the Government was using the transcript (as, indeed, it had the right to do), or that access thereto might aid the defendants in preparing for trial, are not sufficient grounds for breaching the traditional secrecy of grand jury proceedings. The court's third reason—that the defendants could not otherwise obtain the information contained in the transcript—rests, we believe, upon a misconception of the purpose of the federal discovery rules.

Those rules are designed to enable the "parties to obtain the fullest possible knowledge of the issues and *facts* before trial" (*Hickman* v. *Taylor*, 329 U. S. 495, 501; emphasis added). They are not designed to permit the parties to examine the *evidence* in the

hands of their adversaries. In the instant case, the defendants could have obtained all pertinent *facts* without recourse to the grand jury transcript, either through interviews with the witnesses who appeared before the grand jury, or by taking their depositions.[4] Since the defendants made no showing that they needed the actual transcript to prepare their case, the secrecy of the grand jury proceedings should have been maintained. Cf. *United States* v. *Reynolds*, 345 U. S. 1.

Even in a criminal case, a defendant cannot obtain the transcript of his own grand jury testimony as of right (*Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9), and cases there cited), but only upon a clear showing that "strict application" of the traditional secrecy rule "would defeat the ends of justice." *United States* v. *Rose*, 215 F. 2d 617, 628–29 (C. A. 3); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. *A fortiori*, disclosure of grand jury testimony may be ordered in a civil case only upon the

[4] The defendants concededly knew the identity of most, if not all, of the grand jury witnesses, and the Government was willing to disclose their identity. See transcript of hearing, June 11, 1956, pp. 42–43, 49, contained under tab 108 in the record on file with this Court; Procter motion for disclosure, filed September 24, 1954, p. 2 (tab 32); Lever brief, dated November 28, 1955, pp. 5–6 (tab 158); Colgate memorandum, dated November 28, 1955, pp. 2, 10 (tab 159). A majority of the witnesses were or had been officers or employees of the defendants. *Ibid.* One witness had died subsequent to the grand jury proceedings, but this was not the basis of defendants' demand for his testimony. There was no showing that defendants had not already interviewed him, or that the facts as to the matters about which he had testified could not be ascertained from others.

APPENDIX TO COURT'S OPINION

In its opinion granting the defendants' motions to compel the plaintiff to produce the grand jury transcripts, the court referred to the serious, complex, and unique procedural problems involved in this case. A discussion of those problems will show their relationship to defendants' motions as well as explain the references in the opinion to other phases of this case. Also, judges and lawyers who in future years will be involved in protracted anti-trust cases—a "Big Case"—will be aided by a description of the unusual procedure successfully used in this case during the normally gruelling Battle for Documents.

When the plaintiff filed three omnibus motions under Rule 34, designating by category descriptions the types of documents sought from the three manufacturing defendants, the court studied the lengthy descriptions. It would have been impossible to decide intelligently the issue, viz, whether plaintiff's assertion of "good cause" for the production of the documents was outweighed by defendants' assertion that additional production would force them to undergo an unreasonably disruptive and expensive file search. The court also was greatly concerned about plaintiff's failure to reveal sufficient relevant facts which it had discovered from defendants' earlier production of documents. By suggesting a procedure the court hopefully anticipated that if plaintiff would reveal its facts defendants would consent to produce some documents, thereby limiting plaintiff's requests for documents in a greatly modified substitute motion.

most compelling showing of necessity. We submit that the district court erred when it held that the kind of showing made by the defendants in this case satisfied the "good cause" requirement of Rule 34.

Indeed, we think that there is serious question whether Rule 34 was intended to permit parties in a civil case to obtain access to grand jury transcripts at all. The policy considerations upon which the grand jury secrecy rule is based (see *infra*, p. 9) are at least as compelling as those upon which this Court relied in *Hickman* v. *Taylor*, 329 U. S. 495, in denying production of a lawyer's "work product."

2. Rule 34 not only requires that "good cause" for production be shown, but further limits production to material "not privileged." We believe that the Attorney General, by filing a formal claim of privilege with respect to documents in his possession and custody, properly invoked the privilege against disclosure of executive papers. See *Duncan* v. *Cammell, Laird & Co.*, [1942] A. C. 624. Thus, wholly apart from the question whether the defendants had shown "good cause" for production of the transcript, we submit that the district court erred in directing production after the Attorney General had made the claim of privilege. Cf. *United States* v. *Reynolds*, *supra*.

The effect to be given to a claim of privilege made by the head of an Executive Department when a litigant seeks discovery of documents in his official possession, the disclosure of which he deems contrary to

Happily, to date it appears that plaintiff's motions are or will be entirely unnecessary.[1]

A detailed discussion of most of the litigation events which have occurred in this case is required to understand counsels' arguments as well as the court's solution of the serious and recurrent problem concerning the production of documents in a protracted anti-trust case.

March 6, 1953, plaintiff filed the first motion. It was for an order requiring defendant Procter to produce documents under Rule 34, "* * * and permit the plaintiff to inspect and remove from the custody of the Clerk for the purpose of copying * * * certain documents identified by numbers affixed thereto by defendant, such numbers being listed in Exhibit 'A' attached hereto. * * *." The documents

[1] April 19, 1955, was the happy day on which all counsel appeared in court and presented consent orders covering all of the Rule 34 motion, except documents relating to market position. Counsels' comments regarding the effectiveness of the procedure which resulted in the consent orders encouraged the court to write this description. For example, Mr. Kramer, counsel for plaintiff, said: "* * * your honor came up with not only a highly ingenious suggestion for cutting the Gordian knot of the battle of the papers, but also the suggestions proved to have been quite fruitful, I think, from the Court's point of view and, I am sure, from that of all the parties. Everyone has had to give up something, but in the process I am sure that the Government has learned a great deal about its case, and about the way in which to operate cases of this size. * * *." Mr. Royall, counsel for Procter, agreed with Kramer " * * * as to the benefit that everyone has derived from the procedures which your Honor suggested. * * *." Mr. Fortas, counsel for Lever, expressed "* * * my appreciation, as a member of the Bar and as one of the counsel in this case, to your Honor for devising this procedure, which I believe has worked out very satisfactorily, thanks to your Honor's order and to the cooperation among all counsel. I believe that the years to come may show that this has been a significant contribution to antitrust procedure."

the public interest, is an important question of Federal law which this Court has not yet decided.[5]

3. The rule protecting the secrecy of grand jury proceedings is grounded upon important considerations of public policy. Unless such secrecy is maintained, witnesses before the grand jury are unlikely to testify freely, grand jurors may be inhibited in the performance of their duties, and the effectiveness of the grand jury as an instrument of law enforcement may be seriously weakened. Cf. *United States* v. *Rose*, 215 F. 2d 617, 628–29 (C. A., 3); *Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9). Preservation of such secrecy is particularly important in the antitrust field, where the Government's witnesses frequently are persons who, because of their economic relationships with defendants, would be unwilling to appear and testify freeely before the grand jury if their testimony might later be disclosed. The fact that the grand jury has been discharged without returning an indictment does not make these policy considerations any the less applicable.

---

[5] In *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940, there was presented the question whether a district court properly required production in a civil suit of correspondence of the Department of Justice and reports of agents of the Federal Bureau of Investigation which the Attorney General had determined were privileged, but the judgment was affirmed by an equally divided court. In *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, the Court found it unnecessary to "consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession * * *" (p. 467).

Now before the court are defendants' motions for an order compelling plaintiff to produce and permit the inspection and copying by the defendants of the transcripts of the testimony of all witnesses who appeared before the grand jury.[2] There are two issues:

(1) Whether the ends of justice require the court to exercise its discretion under Rule 34 to order plaintiff to produce and permit the inspection and copying by the defendants of the transcripts of the testimony of all witnesses who appeared before the grand jury.[3]

(2) If the ends of justice require production, whether there is any reason for maintaining the secrecy of the transcripts.

The Supreme Court has stated the lofty purpose of discovery which this court has followed[4] and will continue to follow in approaching its consideration of the first issue:

---

of the Act. In general, the offenses charged are that since 1926 defendants have been engaged in a conspiracy in unreasonable restraint of and to monopolize trade in the production and sale of soap and synthetic detergents, and the three manufacturing defendants have continuously monopolized that trade. Plaintiff asks that defendants be enjoined from continuing their alleged offenses and that each of the manufacturing defendants be dissolved into independent organizations.

[2] Alternative motions are for an order compelling plaintiff to produce the transcripts of those witnesses who consent thereto.

[3] In *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 233, 234 (1940), the Court stated: "* * * Grand jury testimony is ordinarily confidential. See Wigmore, *supra*, § 2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. * * *" Rule 34 requires a showing of "good cause" for the production of documents. Surely, if the ends of justice require disclosure of the grand jury testimony, that is good cause for the production of the transcripts.

[4] See the description in the Appendix of the unusual procedure used in this case.

> "* * * Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. * * *." *Hickman* v. *Taylor,* 329 U. S. 495, 507 (1947).

The very substantial contention of defendants is that plaintiff has used the facts contained in the transcripts to gain an unfair advantage over defendants who have been unable to use these facts in preparing for trial. They argue that justice, as implemented by the broad discovery rules,[5] entitles them to use these transcripts. As a result of that persuasive contention and because this is a "Big Case"[6] involving serious, complex, and unique procedural problems, during the oral argument of these motions the court asked Mr. McDowell, plaintiff's attorney, the following questions:

> "Mr. McDowell, do you object to submitting a detailed affidavit stating exactly (a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial." (Transcript, December 12, 1955, pp. 6–7.)

---

[5] See Rules 26 to 37. And Rule 1 requires this court to construe the Rules "* * * to secure the just, speedy, and inexpensive determination of every action."

[6] The label now is synonymous with Sherman Act cases commenced by the United States against multiple defendants. See "The Big Case," 64 Harv. L. Rev. 27 (1950). The magnitude of this case is described in the Appendix.

He wished to confer with his superiors in the Department of Justice before deciding if he would answer the questions. The court awaited candid answers—but in vain. For Mr. McDowell wrote:

> "The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

His "statement" at the hearing did not answer the questions. Because the plaintiff arbitrarily has refused to answer the court's questions relating to any use of these transcripts, the court has been denied helpful information and as a result has been forced to seek its answers elsewhere.

The Department of Justice, plaintiff's representative in the courts, believes that under the law it has the right and duty to use the grand jury to enforce the anti-trust laws through criminal proceedings, civil actions, or both.[7] This is plaintiff's policy, and although its legality is not now in issue, was it followed

---

[7] See discussion at pp. 3–4 of the appendix. Additional evidence of the Department's intepretation of the law is a statement by the Assistant Attorney General in charge of the Antitrust Division of the Department: On May 12, 1955, he appeared before the Special Antitrust Subcommittee of the Judiciary Committee of the House of Representatives; he stated:

"Finally, I suggest you may wish to consider means available to the Department for compelling production of data before a complaint has been filed in a civil procedure. At the present time in the investigation of civil matters, the Department must

"(a) depend upon the voluntary cooperation of those under investigation;

"(b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

during the grand jury investigation of these defendants?[8] On the day the complaint was filed, the Department issued its usual press release, which included the news that "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings." There was a basis for that statement. An affidavit filed by Mr. McDowell in support of certain omnibus motions under Rule 34[9] indicates that the plaintiff considered its motions as requests for supplementary discovery to add to information previously obtained both from documents and testimony during the grand

---

"(c) make use of the grand jury.

"Those are alternatives.

"From this it seems clear that the sole means for compelling pre-complaint data in civil cases is the grand jury. Some—and I refer to lawyers there primarily—have urged that such use of the grand jury constitutes an abuse of its processes.

"Mr. MALETZ. Do you agree with that position, Judge?

"Mr. BARNES. I do not.

"The CHAIRMAN. I am glad to hear you say that.

* * * * *

"Mr. HARKINS. In that connection, under the Sherman Act, you can use a grand jury to get evidence solely for a Section 4 injunction proceeding, can you not? There is no abuse of using the court's process to convene a grand jury to secure evidence for you solely in a Section 4 proceeding?

"Mr. BARNES. No, I do not think there is any abuse of it." (The colloquy appears in Colgate's Brief, pp. 13–14; its source is the transcript published by the Bureau of National Affairs, Inc., at p. 350.)

[8] If the policy was followed, it is reasonable to conclude that plaintiff has used and will continue to use the transcripts during its preparation for trial; the only other conclusion would be that plaintiff has adopted a useless policy. Furthermore, would plaintiff so vigorously have argued the legality of its multiple use of the grand jury unless in this case it had used the transcripts?

[9] See discussion in the Appendix beginning at p. 7.

jury proceedings. Additionally, a previous opinion in this case is pertinent:

> "* * * Government's counsel stated in affidavit form that the purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them, or of any other Federal anti-trust laws, and, second, determination as to what action should be taken to enforce those laws through criminal proceedings, civil proceedings or both. He further stated that the investigation and all proceedings incident to it, including the grand jury proceeding, were begun and carried on pursuant to and within instructions to accomplish those purposes. * * * *United States* v. *Procter & Gamble, et al.*, 14 F. R. D. 230, 233 (D. C. N. J. 1953).

The evidence before the grand jury, of course, consisted both of documents and testimony, whereas the motions now before the court relate only to the testimony. But none of the evidence as to plaintiff's policy and use of the transcripts indicates that plaintiff is disregarding grand jury testimony.

The court is not completely informed about plaintiff's use of the transcripts, however, because plaintiff's silence as to the extent of its use is not overcome by any evidence similar to that which has enabled the court to decide that plaintiff has used and will continue to use the transcripts during its preparation for trial. As to what use plaintiff plans for the transcripts during the trial itself—subject to the law of evidence—although the court once again is confronted by the lack of answers to its questions, since the case only is in its discovery stage the issues involved are not now before the court.[10]

---

[10] During the trial of *United States* v. *Grunstein & Sons Company*, 137 F. Supp. 197, 203 (D. C. N. J. 1955), a civil action, an

The fact that plaintiff has used and will continue to use the transcripts while preparing for trial is perhaps sufficient reason why the ends of justice require production of the transcripts for defendants' use. But equally important is the extent to which defendants will be aided by such production. The testimony contained in the transcripts is unknown to the court. But plaintiff has never contended it is irrelevant to the issues in this case. Indeed, such a contention would be disingenuous in view of the fact of plaintiff's use of the transcripts. Any relevant information, not privileged, which is the scope of the pretrial discovery mechanism established by Rules 26 to 37, has "* * * a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman* v. *Taylor,* 329 U. S. 495, 501 (1947). Thus, the transcripts would be useful to defendants during their preparation for trial.

Clearly, the ends of justice will be attained by plaintiff's disclosure of the grand jury testimony, and defendants have shown good cause for the production

---

opinion was filed ordering plaintiff to produce the transcripts of the grand jury testimony of "* * * (1) the defendants, who represent that they will take the stand in their own defense, and of (2) any other witnesses before such Grand Jury, who will definitely take the stand at this trial, as soon as such fact definitely appears."

of the transcripts. But, plaintiff argues, if defendants inspect and copy the transcripts, it would violate their traditional secrecy.

Any discussion relating to the secrecy of grand jury transcripts begins with *United States* v. *Rose*, 215 F. 2d 617 (CA 3 1954). There the court summarized, at page 628, the reasons generally given for the rule of secrecy:

> "* * * (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

Do any of those reasons apply in this case? The grand jury having been discharged without returning an indictment, (1) and (2) clearly do not apply; (5) also is not applicable for the very corporations who were being investigated have moved for production of the transcripts. As to (3), the court agrees with Judge Hartshorne's opinion in *United States* v. *Grunstein, supra,* at p. 201:

> "* * * this same reason applies to every possible witness known to one party in a civil proceeding, whose name is desired by the other, a form of discovery clearly requisite. For the Federal Rules of Civil Procedure are based on the conclusion, that this possibility is not

> as great a danger as is the danger of surprise, which habitually resulted previously, when such discovery was generally refused. That this conclusion is sound, is fortified by the fact that the party who already knows of this witness can, by these very same discovery rules, see that this witness' story is not tampered with, by having his depositions taken and sworn to, before he is subjected to any such possible pressure from the other side."

As to (4), *United States* v. *Socony-Vacuum Oil Co.*, *supra*, *United States* v. *Grunstein*, *supra*, and 8 *Wigmore, Evidence*, § 2362 (3d ed. 1940), are persuasive authorities that after the grand jury has been discharged, the temporary guarantee of secrecy ends and disclosure is proper. If the rule were otherwise, it would create an opportunity for abuse by a corrupt witness who could testify falsely without fear of his lies being revealed to public scrutiny and reaction.

Thus, none of the reasons for secrecy of the transcripts applies in this case.

The court indicated during the oral argument that the many criminal cases cited by plaintiff which involved special circumstances for maintaining secrecy properly were distinguishable from this case. Subsequently, *United States* v. *Grunstein*, *supra*, was decided, wherein the court also distinguished the cases where the defendants sought production of the transcripts in order to attack the validity of the indictment.[11] The defendants in this civil action seek the transcripts for discovery purposes.

---

[11] *Shushan* v. *United States*, 117 F. 2d 110 (CA 5 1941); *United States* v. *Papaioanu*, 10 F. R. D. 517 (D. C. Del. 1950); *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y. 1937); *United States* v. *Herzig*, 26 F. 2d 487 (S. D. N. Y. 1928); *United States* v. *Morse*, 292 Fed. 273 (S. D. N. Y. 1922); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y. 1920); *United States* v. *Gould*, 253

Judge Learned Hand's remark in *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y. 1923), is often quoted:

> "* * * no judge of this court has granted it [motion for inspection of the grand jury minutes] and I hope none ever will. * * *."

It was a criminal case in which defendants moved to quash the indictment and at the same time they moved to inspect the grand jury minutes. In his opinion, Judge Hand first denied the motion to quash, then he denied the motion to inspect. The full text of the portion of the opinion relating to the motion to inspect clearly shows that his remark cannot be applied in this case.[12] *United States* v. *Henry S. Mor-*

Fed. 242 (S. D. N. Y. 1918); *United States* v. *Rubin*, 214 Fed. 507 (D. C. Conn. 1914); *United States* v. *Violon*, 173 Fed. 501 (C. C. S. D. N. Y. 1909).

[12] "Finally, the defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible, move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. *U. S.* v. *Violon* (C. C.), 173 Fed. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

gan, et al., Civil Action No. 43–757, S. D. N. Y., also is not persuasive authority for there was no opinion setting forth the court's reasons for denying the defendants' motion for production of the grand jury transcripts; moreover, the court in that case orally admitted that perhaps "* * * I have been unduly affected by that statement of Judge Learned Hand. * * *."[13]

In *United States* v. *General Motors Corp.*, 15 F. R. D. 486, 487, 488 (D. C. Del. 1954), the court denied the defendant's motion under Rule 34 for production of the grand jury transcripts. The court having found no reported case in which a defendant requested in a civil action production of the transcripts under Rule 34, it decided the question "* * * on general principles of long standing, designed to protect and preserve the efficacy of our Grand Jury system." One of the general principles which the court relied upon was that although discovery under the Rules is of extensive scope, it "* * * must be halted when it attempts to invade ground reserved for loftier reasons than thoroughness of preparing one's case on the civil side of the court. * * *." The court decided that protection of the grand jury process was a loftier reason: "* * * The effect on subsequent proceedings, on jurors, on witnesses, on the privacy of the system itself, is of greater moment * * *." This court will not follow that decision, and for two reasons, viz, the opinion does not indicate that the court considered whether plaintiff used the grand jury transcripts in connection with the civil action; and that court mainly relied upon criminal cases wherein the refusal to order production of the transcripts was for reasons not present in this case.

---

[13] Transcript of Hearing filed December 31, 1948, p. 192.

The question to be resolved here by the four motions presents an unprecedented vexing problem, since practically all cases dealing with the subject matter concern cases decided under Rule 6 (e) of the Federal Rules of Criminal Procedure. Here, the applications to inspect and copy the grand jury transcripts are brought under the discovery provisions of the Federal Rules of Civil Procedure. I realize there is a strong caveat against the needless intrusion upon the indispensable secrecy of grand jury proceedings. The reasons therefor were indelibly impressed upon me when I served as Assistant Prosecutor of my home county for ten years where I spent the greater part of the time presenting cases to the grand jury. I realize further that a strong and positive showing should be required of persons seeking to break the seal of secrecy, which never should be done except in extreme instances to prevent clear injustice or an abuse of judicial processes. Which policy should be served here to bring about justice—the policy requiring secrecy, or the policy permitting disclosure for discovery purposes only in the interest of justice? I believe the requirement of secrecy in this case can be safely waived and the minutes of the grand jury divulged within the limits prescribed by the law, and that the failure to do so would be an abuse of discretion and not in the furtherance of justice. Under Rule 6 (e) of the Federal Rules of Criminal Procedure our courts have, by way of interpretation, extended their jurisdiction so as to remove "the veil of secrecy" around grand jury proceedings where, in the court's discretion, the furtherance of justice requires it. If it can be done on the criminal side, I can see no compelling reason why it cannot be safely done on the civil side in this case. I would not grant these motions if I thought they were prejudicial to the public inter-

est, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy. These motions were considered by me objectively and honestly by setting aside all my preconceived ideas on the subject.

The court concludes that since plaintiff is using the transcripts containing relevant information, the ends of justice require the court to order plaintiff to produce and permit the inspection and copying by defendants of the transcripts; equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial; none of the reasons for the rule of secrecy applies.

An order may be submitted in conformity with the opinion herein expressed.

409501—56——4

were designated by numbers assigned by Procter prior to the production of the same documents in compliance with three grand jury subpoenas.[2] Since the documents had been returned to Procter, plaintiff's motion was a necessary procedural move. In opposition to the motion, Procter's principal arguments were that plaintiff failed to show the good cause required by Rule 34, and that plaintiff had abused the process of this court. The substance of the first argument was that "* * * since plaintiff has had possession of the great bulk of Procter documents now asked for a year and a half and has made copies and notes, though improperly, of selected papers, it would seem obvious that plaintiff is already in possession of the information sought and has no cause for production under Rule 34." As to the second argument, "* * * the Government abused the process of the Court by using criminal subpoenas before a Grand Jury in order to prepare for this civil action. * * * Accordingly, this Court should redress the wrongs done to Procter by reason of the abuse described and, by dismissing this motion, should see to it that the Department of Justice in this case and in future cases will take no benefit at all from misusing the Grand Jury process."[3] A further argument was that since proceedings before the grand jury are ex parte, the effect of plaintiff's conduct is that in this civil case plaintiff has obtained ex parte discovery contrary to the mutuality nature of the pretrial discovery rules. In support of its

---

[2] Two subpoenas were served in May 1951, and one in June 1952. Motions to quash the former were extensively argued before Judge Forman, who modified their scope.

[3] According to Procter, plaintiff's use of the grand jury subpoena to obtain facts upon which to base a civil complaint was an abuse of process which can be prevented only by denying plaintiff a second look at the documents.

motion to produce documents, plaintiff argued that "* * * Defendant cannot say that the documents which it was ordered to produce [by Judge Forman during the grand jury investigation] because of their relevance to the descriptions of violations made in the argument [before Judge Forman] are not equally relevant to the allegations of the complaint. Neither can it say that documents which were needed to determine the existence of such possible violations are not now needed to establish the allegations in the complaint." As to Procter's argument regarding the misuse of the grand jury process, according to plaintiff "* * * the investigation [grand jury] was begun and carried on with both criminal enforcement and civil enforcement in mind. The purposes of the investigation were, first, determination whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them, or of any other Federal antitrust laws, and, second, determination as to what action should be taken to enforce those laws through criminal proceedings, civil proceedings or both. * * * Because the Sherman Act's Section 4 by virtue of which civil actions may be brought, is an ancillary section, dependent, as Judge Carpenter stated * * *, [*United States* v. *Swift*, 188 Fed. 92, 196 (D. C. Ill. 1911)], upon the criminal sections, it is difficult to see how any investigation could ever be begun with the sole purpose of bringing a civil case."[4] Plaintiff believed that a Section 4 action could not be commenced until a determination had been made that there had been

[4] Plaintiff also argued that since the dependency of § 4 upon §§ 1, 2 and 3 requires a determination as to whether there has been a criminal violation before a civil action can be commenced under § 4, it would not be an abuse of process to undertake grand jury proceedings with the *sole* purpose of preparing for a civil case under § 4.

a violation of the criminal sections, that whatever other action is taken by the Department of Justice, the preliminary determination must be that there has been a violation of the criminal sections of the Sherman Act.[5]

May 11, 1953, this court filed its opinion granting the motion, *United States* v. *Procter & Gamble, et al.*, 14 F. R. D. 230, deciding that plaintiff properly sought production of the documents "* * * anew in this cause to avoid the objections voiced by defendant's attorney, rather than depend upon the previous possession in the criminal action."[6] As to the abuse of process argument, this court was unwilling "* * * to criticize this procedure [the multiple purpose—criminal, civil, or both—use of the grand jury] by a refusal to allow production of the documents requested." As a result of the skirmish between plaintiff and Procter culminating in this court's order to produce the documents, on plaintiff's application on July 14, 1953, this court also ordered the other three defendants to produce certain enumerated and described documents "* * * the United States desiring these documents [the same as those produced before the grand jury] for use in the present action as though they had been produced by Lever [and Colgate and The Association] pursuant to motion and order under Rule 34 * * *." On the same day there was a stipulation for inspection and copying by defendants of certain "third person" documents. The defendants had sought per-

---

[5] "* * * It [United States] couldn't bring a Section 4 Sherman Act civil case unless it had determined to its satisfaction that there had been violations of the criminal portions of the law."

[6] Mr. Royall, Procter's attorney, had vigorously argued that during the criminal proceedings the documents were illegally obtained, thus they could not be used or ordered produced in this civil action.

mission from plaintiff to inspect and copy documents possessed by plaintiff's attorneys for use in trial preparation and which were obtained from and were records of persons, firms or corporations who are not parties in this action ("third persons"); the stipulation resulted when thirty-seven of the third persons did not object to defendants' inspecting and copying the documents.

June 4, 1953, Procter filed two motions: For the "Return of Copies and Other Writings"[7] and to "Suppress certain Documents."[8] One of Procter's two principal contentions in support of its first motion was its previous contention relating to the abuse of grand jury process. Procter also contended that "* * * Judge Forman, during the hearings on the motions to quash the said subpoenas duces tecum, ruled that the documents to be submitted should be retained in rooms provided in the Federal Building, Newark, New Jersey, and counsel for the Government acquiesced. Nevertheless, in violation of this ruling, as we contend, counsel for the Government caused copies and notes, etc., of certain of the said documents to be made and to be taken to Washington, D. C., where they would normally have been handled or seen by persons not directly concerned with the

[7] Copies of the documents; excerpts from and all notes, analyses, summaries and other writings concerning the documents.

[8] (1) Documents submitted by Procter to the grand jury and listed in plaintiff's motion dated March 6, 1953; (2) copies of, excerpts from and all notes, analyses, summaries and other writings concerning any of the documents; papers, documents and other like evidence obtained directly or indirectly by reason of information or knowledge derived wholly or partially from (1) and (2). Procter also included in the motion any documents, etc., obtained by plaintiff during the grand jury proceedings from any of the other defendants, and any documents, etc., obtained from any source other than defendants.

Grand Jury proceedings."[9] Procter's contentions in support of its second motion included all of its previously discussed arguments regarding plaintiff's motion for the production of documents.[10]

January 14, 1954, this court denied Procter's two motions. Absent any authority, the court was reluctant to erect an "* * * insurmountable obstacle to any civil action * * *," which probably would have resulted if the motion had been granted.[11]

August 23, 1954, plaintiff filed the three omnibus motions under Rule 34 for production of documents by the three manufacturing defendants, and on Sep-

---

[9] Royall's affidavit dated June 4, 1953, p. 2.

[10] The only effective remedy, argued Procter, for plaintiff's conduct is to prohibit plaintiff's use of the documents. Plaintiff again argued: "* * * Section 4 of the Sherman Act, the section under which the instant civil action was brought, is simply an ancillary provision to Sections 1, 2 and 3 which establish and define crimes. *The civil action may be brought only 'to prevent and restrain violations' of the Act's criminal provisions.'* (15 U. S. C. A. § 4). * * *."

[11] "* * * the proper remedy is not the granting of this type of motion, which would probably result in an insurmountable obstacle to any civil action, but by a direct attack at the outset of the criminal investigation. Indirect deterrence does not outweigh enforcement of the antitrust laws. If the court were to grant these motions, would it not, in effect, forever bar a civil action? And would not the principle of law be that where documents are produced by a party pursuant to a subpoena duces tecum for consideration by a grand jury and thereafter the documents returned, no indictment having been found, as was the case here, and subsequently a civil action is commenced by the United States against the same party and the same documents are produced pursuant to Rule 34, that nevertheless the United States must deliver to that party its 'work product' based on the documents and all evidence therefrom must be suppressed. There is no authority or precedent for such a proposition, nor does this court believe that should be the law." (The opinion has not been published.)

tember 24, 1954, amendments were filed. Two of the three motions were eleven pages in length, one was ten pages. For example, plaintiff demanded the following categories of documents from Procter: Profit and loss statements and balance sheets; records or work books showing monthly estimates of departmental expenses and profits and losses; published price lists; sales records; records or work books showing prices, various costs and profits; market surveys, charts, tables and schedules, memoranda and correspondence showing production, sales, purchases, promotional expenditures, inventories, prices, costs, profits; licenses, sub-licenses or other contracts concerning patents; memoranda or correspondence relating to certain patents, negotiations for the procurement of certain materials, construction of facilities by the supplier of certain materials, processing of certain materials; with respect to the production of synthetic detergents, production schedules and estimates, analyses and estimates of base material requirements, sales estimates, and plans, and all memoranda and correspondence relating thereto; contracts with sellers of certain products; memoranda and correspondence relating to price changes and other price data; market surveys, tabulations, memoranda and correspondence relating to shelf prices charged by retailers; records and contracts relating to purchases of tallow or grease during certain periods; memoranda and correspondence relating to purchases of tallow or grease; memoranda and correspondence relating to the termination of the "official New York market price" for tallow or grease, and to the criteria in determining their price; tri-party contract establishing brand quotas or other limitations on advertising and promotional expenses entered into by Procter, Colgate, and Lever in or about January 1938, and all reports, memoranda and

correspondence relating thereto; records showing total advertising expenditures and brands sales promotion for each brand; sales division expenses records; memoranda and correspondence relating to the discontinuance or limitation by the three manufacturing defendants and/or any other manufacturer of 1¢ or other special sales, special factory packs, premiums, or special advertising allowances; competitive activity reports; promotional records of various sales units; market surveys, tabulations, charts, memoranda and correspondence relating to the planning and conduct of certain promotional couponing campaigns; records showing sales by product categories as reported to the defendant Association; records showing sales and shipments by product categories as submitted to the Bureau of Census of the United States Department of Commerce; records showing sales by brands; records showing sales of various products by dollar amounts; records showing sales of glycerine; memoranda, correspondence, and reports relating to comparative washing tests and detergent evaluations of any brands of other companies; memoranda and correspondence relating to negotiations for the purchase of rights to the product "Glim" from the General Aniline & Film Corporation.

Defendants' lengthy briefs and affidavits in opposition to the three motions greatly interested the court in the procedural problems of a "Big Case."[12] The

---

[12] For example, Mr. Siddall of Procter swore that his company already had produced twenty-two full filing cabinet drawers, containing in excess of 50,000 pieces of paper, books, and other corporate records; he estimated that thus far the cost involved in the search of files exceeded $175,000, exclusive of all legal expenses and that the search would require the full or part time services of more than 100 employees of the company for a substantial period of time and the direct and indirect expense to the company, apart from the interference with the normal conduct

court's research and its own ideas resulted in a suggested procedure which was read to counsel during the oral argument:

> "Of course, I am happy to note that both sides agree with my opening remarks in an attempt to focus the problem of revealing more specifically the facts upon which the Government bases its case.[13] I have some suggestions. If you will bear with me, it may be productive of some good. I hope it will be. So far we have gotten off to a pretty good start and there is indication of a spirit of cooperation.
>
> "Now, I have a suggested manner of procedure. I thought I would give it to you before lunchtime so you gentlemen can think it over and see whether or not you think this is as good as I think it is. I will concede that many of you attorneys in this case know more about antitrust litigation than the Court will ever know.
>
> "I will, of course, limit discovery to documents which are relevant to the issues in the case. That's difficult because we don't have the issues yet.

---

of its business, would be $60,000. Mr. Pollock of Colgate swore that production of documents under six paragraphs alone would exceed the total production of 45,000 pages under the three grand jury subpoenas. Mr. Kissner of Lever swore that the motion, if granted, would require Lever to examine 200 file drawers and 1,200,000 papers, and two paragraphs of the motion would require it to produce 300,000 documents.

[13] The court's opening remarks were, in part, prompted by Judge Prettyman's comments at the Symposium of the New York State Bar Association Section on Antitrust Law, held on January 24, 1951:

"* * * a trial is for the determination of issues; issues are disputes; a dispute must concern a known subject; to be justiciable, the positions of the parties upon the subject must be known; to be persuasive, evidence must be understandable and definitive."

"The pleadings have not particularized the issue. Thus it is the job of the Court and counsel to do it as soon as possible.

"The parties should agree upon a statement of the issues, but if that is impossible they may submit to the Court their proposed statements, which will always be subject to any necessary amendments.

"When the issues have been defined, the plaintiff, in accordance with Mr. Barnes' promise, should relate to the issues and specify the documents it intends to rely upon to prove those issues.

"As to the period of time for which discovery will be allowed at this time, no document relating to conduct later than December 11, 1952, I believe, should be produced—December 11, 1952."[14] Any conduct of the defendants subsequent to that date, on which the complaint was filed, may be relevant to the problem of the remedy, if the defendants are liable, but such post-complaint conduct is not relevant to the liability phase of this case, in the Court's opinion.

"Plaintiff has complained of an alleged condition existing prior to that date, a combination-conspiracy-monopolizing brought about by an alleged course of conduct occurring prior to that date. By its very contents a complaint of this sort looks to the past, complains of the past, and says because of the past, laws have been violated.

"Since the complaint alleges a conspiracy and a monopolization, however, as a matter of substantive law at the trial it may be necessary for the court to consider the impact of the defendants' conduct upon actual or potential competition. And if that is the case, perhaps evidence of competitive activity, or the lack of it,

---

[14] Plaintiff later consented to limit its motions for discovery to documents pre-dating the complaint.

would be significant. 65 Harvard Law Review, 1079.

"As to plaintiff's desire to search into antiquity, since plaintiff has alleged that defendants have formed a combination and conspiracy, proof of it is, of course, essential to the plaintiff's case, so that documents, however ancient, relating to the alleged formation, are properly within the scope of the case. The rub here, however, is in the breadth of the word 'relating', which always causes a great deal of trouble, there being no document labeled 'Combination and Conspiracy Agreement.' But conduct alleged to have been pursuant to the alleged combination and conspiracy may have occurred so many years ago that proof of it will not aid the Court in deciding whether or not any unlawful results have occurred. The distinction here is between evidence of conspiracy and evidence of conspiratorial conduct, the latter presenting the familiar quantitative problems of cumulative evidence and bulk, which counsel must earnestly strive to limit, both for the benefit of the Court and their clients.

"The test for each category of documents sought is, of course, relevancy. But in this case we should add the words 'and necessity.' Plaintiff must show not only that it needs the documents for purposes of its trial preparation, but also that it needs them at this time. Has plaintiff completed its analysis of documents previously produced?

* * * * *

"Furthermore, it appears that at least one discovery order has not yet been fully complied with. According to the brief of Lever Brothers, 'The parties have been and currently are engaged in carrying out' a discovery order entered on July 14, 1953, pursuant to which Lever Brothers transmitted documents to the plaintiff as late as September 28, 1954. Since documents were produced only two weeks ago,

plaintiff must show not only that the document designated in the current motion are relevant t the issues, but are needed at this time by th plaintiff's attorneys. Is their work schedule s arranged that they will be able to examine thes documents at this time or in the foreseeabl future?

* * * * *

"The Court hereby sets forth some ideas fo keeping this case within reasonable, workabl bounds, if that can be done in an antitrust case (1) It is absolutely necessary to eliminate fron plaintiff's discovery efforts any document which are cumulative, repetitive, and in the na ture of housekeeping papers. (2) One metho by which the volume of documents might b reduced would be for the defendants to produc samples or statistics for representative years then after analysis, plaintiff, if it desired t rely upon those samplings, would stipulate wit defendants that it is a sample which is repre sentative, if, in fact, such is the case. Or th Court could order production of the sample documents upon plaintiff's showing of necessity (3) In order to create issues of fact, obviously plaintiff must reveal more facts. For example the complaint alleges that defendants have at tained, maintained, augmented, and exploite dominance over all others purchasing and sellin principal materials used in the production o synthetic detergents. To such allegations o conclusions we must apply questions—How when and by whom was it done? How did de fendants achieve their alleged dominance 'By mergers and acquisitions,' alleges the plain tiff. To which may be asked the question When and by whom?

"Or, plaintiff alleges, 'It was done by con trolling, fixing, regulating and manipulatin prices, terms and conditions of sales, and pro motional activities,' as to which the natura

question might be: How? Plaintiff alleges, 'By exchanging information.' But it may be asked: When?

"Frankly, plaintiff should state the evidence upon which it intends to rely. Perhaps this could be done by answers to interrogatories pursuant to Rule 33 * * *.

"(4) The parties should enter into stipulations as to undisputed facts or facts not subject to justifiable dispute. Rule 36 pertaining to admissions might be usefully employed here.

"(5) Defendants might produce summaries of documents, keeping the originals readily accessible upon demand.

* * * * *

(Transcript, pp. 41–46.)

Plaintiff not only "* * * welcome[d] your Honor's indication that you do not consider the material relating to the post-complaint matters as being relevant to these issues. I think that in itself will help a great deal," but also stated that it was willing to modify its lengthy motions.[15] Since the court's many oral suggestions required careful analysis by and conferences among all counsel, there was an adjournment of further argument on plaintiff's three motions.

October 22, 1954, the court in a letter to counsel made suggestions to guide them for the next hearing:

> "Plaintiff requires documents to properly prepare its case. Since plaintiff's motion for discovery under Rule 34 is before the court, the designation of documents therein will be our guidepost. I was persuaded during plaintiff's argument at the hearing on October 14, 1954, of the great physical and financial burden to the defendants involved in producing the re-

[15] Properly, counsel for Lever was greatly disturbed at such an indication of plaintiff's "undigested requests" for documents. (Transcript, p. 56.)

quested documents, so that now we should concentrate on the significance of the documents. There should be a showing by the plaintiff that its work schedule will enable its attorneys to use the documents, especially since it appears that some documents are currently being produced pursuant to prior discovery orders and agreements, which have not been examined yet by the plaintiff.

"Prior to hearing argument on the motion, the court will hear counsel on the following matters:

"1. A proposed modus operandi worked out by both sides, including a tentative time-table for production of documents and for pretrial conferences.

"2. Can counsel agree upon a statement of the issues?

"3. It appears that when plantiff is ready to reveal more facts upon which it will rely, then defendants will not object to producing documents pertaining thereto. At this time, is it unreasonable to ask plaintiff what facts it has determined from the many documents already produced? Is the case ripe for a statement of facts by plaintiff? If not, when?

"4. Since plaintiff welcomed the court's discovery limitation (transcript p. 52) and said that it will voluntarily withdraw and limit certain portions of its motion, is it prepared to do so? If so, how?

"5. If counsel have not agreed as to the cut-off date limiting plaintiff's period of inquiry, I shall hear argument thereupon.

"6. Assuming plaintiff does not seek 'housekeeping' documents, plaintiff should define the word.

"7. Have counsel agreed to the production of sample documents, statistics, and summaries?

"8. Have counsel agreed whether documents relating to industrial products are relevant?

"9. Are not the words 'relating,' 'concerning,' 'referring to,' 'showing,' which are used

throughout the motion papers properly subject to at least two interpretations, viz., the document is sought if (a) within its four corners it evidences the designated subject, or (b) there is a relationship between the document and the designated subject. Which interpretation is intended by plaintiff?

"10. Have counsel entered into any stipulations of fact?

"While I encourage counsel to take positions on many points, no one should fear that subsequently he will not be permitted to modify them. In our 'Big Case' there will be no arbitrary rules binding the parties to any positions taken up to keep the case in manageable shape.

"Finally, defendants have emphasized their need for plaintiff to reveal the documents and facts upon which it will rely, relating them to the issues. The argument appears valid in that unnecessary trial adjournments on the grounds of surprise might thereby be avoided. But do the defendants need such information at this stage of the case? If and when the need is shown, will plaintiff be ready to comply?"

The hearing was set for December 7, 1954. Meantime, all counsel had conferred five times and had submitted reports to the court. As a result, the court was able to determine the remaining areas of contention regarding the still pending plaintiff's motions for the production of documents. Again, the court's opening oral remarks at the hearing describe its approach:

"Now, at the outset I should like to commend and thank counsel who have submitted to the Court their reports of the five meetings held since the October 14, 1954 hearing in this courtroom. While there is no verbatim transcript, after reading the reports the Court has been able to determine some of the areas of contention and differences of opinion.

"Also, I am extremely pleased that five meetings have been held. Although all problems have not been solved, which was my fervent hope, I believe that we are on our way toward keeping this case in manageable shape. While you have not agreed on voluntary production—except that defendants will bring up to the date of the complaint the documents of the same description previously produced—I believe that plaintiff has more specifically revealed some of the ultimate facts upon which it bases its case. Of course, you may disagree with me on that statement.

"Prior to hearing counsel on the motion, in order that you might direct your arguments toward the problems which I perceive now to be before us, I should like to comment further.

"1. Defendants contend that plaintiff should reveal more facts which it has ascertained from its examinations of documents previously produced.

"Several times in their reports counsel for Lever and Procter state that plaintiff concedes that it has facts and that defendants are entitled to them substantially in advance of trial, but that at this time the plaintiff will not reveal these facts. This really goes to the crux of the motion, I believe, now before the Court because I believe that as more facts are revealed to the defendants they will voluntarily produce documents relating thereto.

"I am convinced of that. I don't know whether the Government is, but I am.

"Thus Item 3 in the Court's letter to counsel dated October 22, 1954, is the starting point for today's argument. 'At this time is it unreasonable to ask plaintiff what facts it has determined from the many documents already produced? Is the case ripe for a statement of facts by the plaintiff? If not, when?

"One of my concerns is that since plaintiff has been preparing its case for probably three

years, or longer, how long must we wait for defendants to prepare their case? The sooner defendants are informed of plaintiff's factual contentions, the sooner defense preparation can commence—and not before, obviously.

"The 'Tentative Statements of Issues of Fact' submitted by the plaintiff contain some revelations of fact which will aid us on this motion; but as to the general statements therein, perhaps defendants should use interrogatories under Rule 33, which provides that when questions are propounded by a party, it 'shall furnish such information as is available to the party.'

"I want plaintiff's counsel to tell me (1) Does plaintiff now have unrevealed facts? (2) If it does, what objection is there to revealing them to the defendants at this time? And if plaintiff does have unrevealed facts, why doesn't it use Rule 36 pertaining to admissions, then perhaps certain issues of fact will be eliminated from the case, thereby eliminating the need for the production of documents relating thereto.

"2. Are the 'Tentative Statements of Issues of Fact' sufficiently specific to enable Court and counsel to determine the need for the production of additional documents and to enable defendants to prepare their defense?

"I have found twelve statements that appear to meet the 'how, when, and by whom test.' In the Statement re Advertising and Promotions, paragraph I-B-1 states how—agreement; when—1937; by whom—manufacturing defendants; and what—limitations on advertising and promotional expenditures for established brands.

"So, as to that statement, while preparing their case, defendants know that the plaintiff will offer evidence to prove that in 1937 the manufacturing defendants entered into an

agreement imposing limitations on their advertising and promotional expenditures for their established brands; and, secondly, any documents which evidence such an alleged agreement are a relevant subject in a discovery motion.

"Also in the Statement re Advertising and Promotions, paragraph I–B–2 appears to be sufficiently specific for our twofold purpose, as do paragraphs II–B–1, II–B–3 and II–B–4 in the same Statement.

"Now, in the statement re Glycerine, the following paragraphs appear to be sufficiently specific: I–A–2, I–B–1, I–B–2 and I–B–3.

"And in the Statement re Tallow and Grease, paragraphs I–B–2, I–B–3 and I–B–4 appear to meet our test and purpose.

"An example of the importance for plaintiff to reveal facts is shown by comparing its Statement re Advertising and Promotions, paragraph I–B–1, with the sole allegation in the complaint relating to the fact of limitations on expenditures, which is on page twelve of the complaint, Item 7, 'By controlling, manipulating and fixing amounts which they expend for promotions and advertising.'

"Compare that statement with the new statement, 'In 1937 the manufacturing defendants reached an agreement imposing limitations on their advertising and promotional expenditures for their established brands.'

"From the latter we now know two factual contentions—(1) agreement, (2) 1937—which were not revealed in the complaint.

"Thus as to the prices; advertising and promotion; glycerine; tallow and grease, plaintiff has stated some of the ultimate facts upon which it will rely. My comments on plaintiff's new Statements were not intended to be exhaustive, but only to illustrate my tentative thinking regarding the main objection now

raised by the defendants. Of course, I want to hear the views of counsel on the problem.

"3. Has there been compliance with all prior discovery orders, because as I noted in my letter of October 22 it then appeared that some documents were currently being produced.

"4. Modification of the motion. Item 4 in the Court's letter of the same date suggested that plaintiff might desire to modify its motion and the reports by Lever and Procter indicate that plaintiff concedes that some of the material demanded either would be withdrawn or disposed of by stipulation.

"Of course, still we are faced with the problem of how many years back should production be ordered. In plaintiff's Tentative Statements, however, there are date references tied in with certain alleged conduct, as, for example, beginning in 1936 defendants have fixed prices; in 1926 defendants formed the defendant Association; beginning in 1937 defendants established identical list prices.

"Such 'when' information is an improvement over the sole allegation in the complaint as to the date—'Beginning in 1926 and continuing thereafter,'—which is found on page 10, Item 32 of the complaint.

"I now ask if all counsel agree with Procter's statement at page 10 of its report that we should defer argument regarding a cut-off date? Or should the question now be argued?[16]

* * * * *

Although plaintiff admitted it had discovered many facts from the documents previously produced, it vigorously argued that defendants did not then need those facts. The court was persuaded that plaintiff improperly had refused to reveal facts even though

[16] Argument has been deferred.

several days earlier on December 3, 1954, it had submitted to defendants "Tentative Statements of Issues of Fact," relating to: (1) prices and costs, (2) advertising and promotions, (3) glycerine, (4) tallow and grease.[17] While those statements were more specific than the allegations in the complaint, (see for example, the court's December 7, 1954, comments, quoted *supra,*) it was obvious that plaintiff could have stated more facts. Believing that in a protracted anti-trust action there must be an early disclosure of facts, the court suggested and the parties accepted a procedure. It was designed to hurdle what the court felt was the only obstacle to defendants' consent to produce some documents and to give defendants the facts relied upon by plaintiff, permitting plaintiff to object to being ordered to disclose any detailed, evidential facts.

> "Using the plaintiff's tentative statements of issues of fact as a basis—
>
> "(1) Within ten days from today, defendants submit to court and counsel their questions, such as Mr. Fortas' oral questions in court today, directed to the plaintiff's statements.
>
> "(2) Within ten days after defendants have served and filed their questions, plaintiff submit to the court their objections, and, of course, perhaps as to some questions plaintiff will not object to supplying answers.
>
> "(3) Court will rule on which questions must be answered.
>
> "(4) Then within two weeks of the Court's rulings on the questions and answers, plantiff serve and file answers.

---

[17] Plaintiff also submitted on February 18, 1955, statements relating to mergers and acquisitions, and patents, and on May 9, 1955, market position.

"(5) Then within one month both parties, either with or without the Court's aid, agree on voluntary production and where there is disagreement the Court will rule and enter orders based on plaintiff's *reframed* motion. As to the time intervals, if counsel believe more time is needed, let's settle it now and there will be no extensions."

Commencing about January 1, 1955, and continuing until January 13, 1955, Procter, Colgate, and Lever submitted their questions relating to plaintiff's tenative statements of issues of fact; for example, one of plaintiff's statements as to prices and costs was "1. In 1926 Procter, Lever, and the three companies which later merged to form Colgate joined with other soap manufacturers to establish the defendant Association for the purpose, among others, of considering joint action among such manufacturers with respect to matters affecting prices." Lever asked five questions relating to that statement: "1. Is the reference to 'such manufacturers' meant to include all the soap manufacturers forming the Association. 2. Specify the 'joint action * * * with respect to matters affecting prices' for which the Association was allegedly established. 3. Specify the other purposes for which the Association was established. 4. Identify the 'matters' as to which the soap manufacturers are alleged to have considered joint action affecting prices; specify the use or proposed use of the Association in relation thereto; and describe the activities of Lever Brothers in connection therewith. 5. Identify the documents presently in the Government's posssession which provide a basis for the allegations and which show that Lever Brothers participated in the activities described in [the statement]." Plaintiff answered the questions: 1. Yes. 2. "To eliminate 'trade wars,'

'cannibalism' and 'forcing' in the manufacture and sale of soap products; to increase the revenue obtainable from the sale of glycerine, the principal by-product from the manufacture of soap. 3. "* * * according to its Certificate of Incorporation, were: '* * * collecting and circulating information valuable and useful to the public with reference to the use of soap and kindred products, * * * investigating the nature and use of glycerine and kindred substances and disseminating information with reference thereto, and * * * promoting the best interests of producers of soap and glycerine and kindred products.'" 4. "The Association was established for the purpose of considering joint action with respect to the following matters allegedly affecting the prices of household soap products and glycerine: excessive glycerine production and supply; excessive household soap production and supply; trade wars; cannibalism; and forcing. The use of the Association in relation thereto was that stated in the issue, namely 'considering joint action.' In this respect, the Association was used as a forum or meeting ground. Lever Brothers, either directly or through its officers and agents, attended meetings of the Association, served on Association committees, held official positions and memberships on the Board of Directors, voted, paid dues and made other financial contributions to support Association activities, and in general took part in activities of the Association." As to question 5, the court sustained plaintiff's objection to answering it.

January 13, 1955, plaintiff filed a brief objecting to some of defendants' questions. The objections mainly were to questions asking for a designation of

documents relied upon as evidence of alleged facts,[18] and to questions asking for detailed evidential facts.[19]

January 25, 1955, the court filed its opinion:

> "The procedure suggested by this court and accepted by all counsel during the December 7, 1954, hearing (transcript pp. 97–8) was devised because the defendants properly asked the plaintiff to disclose what facts it had ascertained from the produced documents.
>
> "Pursuant to phase (1) of the procedure the defendants have served and filed questions directed to the plaintiff's Tentative Statements of Issues of Fact, and pursuant to phase (2) the plaintiff has served and filed its objections to answering certain questions.
>
> "At this time, the plaintiff need not designate the documents relied upon or set forth the substance of its evidence of the alleged facts. Although I did not believe that the defendants now would ask for such information, nevertheless, during the hearing on plaintiff's reframed motion (see phase (5) transcript p. 98) I shall hear counsel on the problem. My present thinking is that plaintiff should designate documents when it completes discovery under Rule 34 after documents are produced pursuant to the reframed motion.
>
> "As to the questions objected to by the numbers listed at pp. 9 and 10 in the plaintiff's Memorandum of Objections dated January 13, 1955, I hereby order that the following questions be answered:

---

[18] For example, Lever's question #5 quoted above.

[19] For example, "state the basis upon which it is alleged"; "indicate all instances"; "describe the information exchanged"; "specify the dates, place, quantity, etc."

PROCTER

57, 58, 81, 112, 132, 134.

LEVER

81, 87, 93, 94, 116, 124.

COLGATE

41, 42, 75.

"As to the questions objected to by the numbers listed at footnote 5, p. 10 of plaintiff's Memorandum, the above orders will guide plaintiff and I shall rely on its good faith in answering those questions in accord with the orders herein and the intent and spirit of Rule 33.

"Within one month after the date on which plaintiff completes the service and filing of its answers to the quesions, unless plaintiff requests an extension of time, counsel for both sides will attempt to agree on voluntary production, and where there is disagreement I anticipate the filing of a reframed motion under Rule 34 (transcript, p. 98)."

Pursuant to the court's opinion, on March 2, 1955, plaintiff answered the questions which previously it had objected to answering. Then for the next several months defendants and plaintiff continued to exchange quesions and answers based upon plaintiff's Tentative Statements. Finally, on April 19, 1955, after counsel had conferred five times, they appeared in court and presented their consent orders.[20]

---

[20] See footnote 1, *supra*. Since plaintiff had not submitted its Tentative Statement relating to market position, the consent orders did not cover the relevant documents. However, in May, June, and July, 1955, plaintiff submitted its Statement relating to market

United States District Court
District of New Jersey

Civil Action No. 1196–52

On plaintiff's motion for reconsideration of ruling on defendants' motions to inspect the grand jury transcripts and for ruling on claim of privilege.

On defendants' motions to settle terms of order to inspect or copy transcripts of testimony heard before grand jury.

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Opinion

MODARELLI, District Judge.

On April 17, 1956, I filed an opinion on defendants' motions to compel plaintiff to produce and permit the inspection and copying by the defendants of the transcripts of the testimony of all witnesses who appeared before a grand jury sitting in this district from May, 1951, until November 25, 1952. I concluded that since plaintiff is using the transcripts containing relevant information, and since equal use of the transcripts by defendants will give them the

---

position, defendants asked their questions, and plaintiff answered them. The parties have not advised the court concerning the so-called market position documents described in plaintiff's Rule 34 motions. Since, however, plaintiff has submitted its Tentative Statement relating to market position and the parties have exchanged questions and answers, it appears that consent orders will be presented.

fullest possible knowledge of the facts before trial, and since none of the reasons for the rule of secrecy applies, the ends of justice required me to grant the motions.

Now before me are: (1) Plaintiff's motion that "* * * this Court reconsider its conclusion that the extensive scope of pre-trial discovery permitted under the Federal Rules of Civil Procedure warrants disclosure in this civil case of traditionally secret grand jury proceedings, and, in the light of the claim of privilege asserted by the Attorney General, that this Court sustain the privileged status of the grand jury transcripts and enter an order denying defendants access to the transcript of testimony of any witness before the said grand jury." (2) Defendants' motions for settlement of the order directed by me in my opinion granting defendants' motions to produce the transcripts.

(1) As to plaintiff's motion, at the beginning of the oral argument I cautioned its counsel against repeating arguments already presented and considered on the original motion.[1] As his arguments progressed, even though he presented nothing new, I permitted him to argue extensively (approximately

---

[1] As a result of counsel's disregard of my warning and because it is difficult for a judge to refuse to hear oral argument when counsel are present in court, or to halt it once it has begun, the Judges of this Court on June 18, 1956, adopted a new rule:

"A motion for re-argument shall be made within 14 days after the filing of the court's determination of the original motion and upon the same notice required for the original motion. There shall be served with the notice a memorandum, setting forth concisely the *matters or controlling decisions which counsel believes the court has overlooked*. No oral argument shall be heard unless the court grants the motion and specifically directs that the matters shall be re-argued orally." [Emphasis supplied.]

Of course, the rule does not apply here, but the emphasized portion does express the proper nature of re-argument.

54 transcript pages) because I believed that in accordance with my opening remark he would present something new.[2] He did not.

Plaintiff's motion is based upon a "CLAIM OF PRIVILEGE" filed by Attorney General Brownell. Summarized, his claim is that it is his joint duty with the court to protect the integrity of the grand-jury processes; he has carefully considered the effects of disclosure of the transcripts upon the public interest in the proper administration of justice; the established policy of secrecy is based upon a desire to encourage free disclosure by grand jury witnesses; if the court orders disclosure of the transcripts, future grand jury witnesses will be reluctant to give testimony detrimental to the interests of economically powerful potential defendants.

In support of its claim of privilege, plaintiff cites the following cases: *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234 (1940); *United States* v. *Rose*, 215 F. 2d 617, 628 (CA 3 1954); *United States* v. *Alper*, 156 F. 2d 222 (CA 2 1946); *Schmidt* v. *United States*, 115 F. 2d 394 (CA 6 1940); *Goodman* v. *United States*, 108 F. 2d 516 (CA 9 1939); *United States* v. *General Motors Corp.*, 15 F. R. D. 486 (D. C. Del. 1954); *United States* v. *Smyth*, 104 F. Supp. 283, 303 (D. C. N. D. Calif. 1952); *In re Bullock*, 103 F. Supp. 639 (D. C. D. C. 1952); *United States* v. *White*, 104 F. Supp. 120 (D. C. N. J. 1952); *United States* v. *American Medi-*

---

[2] *United States* v. *Reynolds*, 395 U. S. 1, 10, 11 (1953), does indicate that after the court has filed an opinion granting discovery against the United States, it is proper to file a formal claim of privilege. But here, as will be discussed, all of the contentions in the claim filed by Attorney General Brownell were presented to and considered by me on the original motion, even though no formal claim had been filed.

cal Association, 26 F. Supp. 429 (D. C. D. C. 1939); *In re Grand Jury Proceedings*, 4 F. Supp. 283 (D. C. E. D. Pa. 1933); *United States* v. *Garsson*, 291 F. 646 (D. C. S. D. N. Y. 1923); *United States* v. *Standard Oil Company of California, et al.*, Civil No. 11584–C, D. C. Calif., Minutes of the Court, March 30, 1956; *United States* v. *Morgan*, Civil Action No. 43–757, (S. D. N. Y., unreported ruling of Judge Medina, December 8, 1948).

The *Socony-Vacuum*, *Rose*, *General Motors*, *Garsson*, and *Morgan* cases were already considered and are discussed in my opinion. The cited portion of the *Smyth* case merely states the general rule of secrecy, which I thoroughly discussed in my opinion. *Alper*, *Schmidt*, *Goodman*, *Bullock*, *American Medical Association*, and *In re Grand Jury Proceedings* recognize that a court should order disclosure when in its judgment the ends of justice so require, which was one of the bases of my decision. *White* recognizes an exception to secrecy in cases of extreme compulsion where there is a strong and positive showing, which is the case here. There was no opinion in *Standard Oil*. As to the other cited cases relating to plaintiff's fourth point concerning "other means" by which defendants could acquire the information contained in the grand jury transcripts, I also previously considered that argument and I rejected it.

At page 12 of my opinion, I said, "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy." That conclusion was reached after thorough deliberation and analysis of the problems and authorities. Before

me at that time was a letter and enclosure from Assistant Attorney General Barnes. He told me about an identical claim of privilege asserted in *United States v. Standard Oil Company of California, et al.;* he noted that the claim was "* * * based on the same grounds urged by counsel for the Government in the motions now pending before you." He enclosed that claim of privilege signed by Mr. Brownell and it was nearly identical to the one he recently filed in this case. Thus, nothing has been brought to my attention since I filed my opinion that was not before me when I considered defendants' motions. Plaintiff's motion is denied.

During oral argument plaintiff's counsel said, "* * * I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but that the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain and prevent violations." (Tr. 12). If that revelation had been in response to my earlier questions regarding plaintiff's use of the transcripts, it would have saved defendants' counsel and me many hours of research and deliberation concerning the very important question as to whether plaintiff is using the transcripts. (See opinion dated April 17, 1956, pp. 4–7). While it is the duty of the attorneys in the Department of Justice to be zealous advocates, this was an inexcusable concealment from the court of a fact material to the issue involved in defendants' motions to produce. I make this criticism because in this "Big Case" it is essential that counsel be cooperative and candid.

(2) As to defendants' motions, plaintiff and defendants will exchange their proposed form of the order. If both sides are unable to agree upon the form, I shall enter an order in a form that I believe is proper.

An order shall be submitted in conformity with this opinion.

United States District Court for the District of New Jersey

Civil Action No. 1196–52

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Amended Order

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company and the Associated Soap and Glycerine Producers, Inc., having filed motions herein on September 24, 1954, November 28, November 28, and November 25, 1953, respectively, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952, insofar as such testimony related to the investigation of antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion filed April 17,

1956, holding that the defendants are entitled to inspect and copy said transcripts of the aforesaid testimony of witnesses before the Grand Jury; and the plaintiff having filed a motion herein dated April 30, 1956 for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for a ruling on plaintiff's claim of privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motions and claim of privilege, and having rendered its opinion, filed July 9, 1956,

Now, therefore, it is

Ordered that the motion and claim of privilege of plaintiff be and they are hereby denied; and it is further

Ordered that unless the plaintiff on or before August 24, 1956 produces at the office of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permits each of the defendants or their counsel to inspect and copy, by photostating or other means, all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein.

(S) ALFRED E. MODARELLI,
United States District Judge.

Dated August 21, 1956.

in advance of non-compliance, or that some other sanction would be more appropriate, acquiesced.

Moreover, the court itself viewed its final judgments of dismissal as resulting from the Government's non-production, not from invitation or consent to dismissal. Thus, on September 6, 1956 (after the time for production had expired), the court sent a letter to all counsel inquiring whether the Government had produced "as directed in the last paragraph of the amended order," and stating that "[i]f the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (J.A. 41). Similarly, the judgments of dismissal themselves recite that the complaint was being dismissed because the Government had not produced (Jur. St. 56-59). The Government cannot be deemed to have consented to or invited such dismissal, as Colgate suggests (Motion 11), because it failed to make production in accordance with the amended order—particularly since it had advised the court, at a time when no production order had yet been entered, that it would not make production (J.A. 13-14).

In final analysis, appellees' contention thus is that because the court initially directed production without specifying the consequence of non-compliance, the Government, in order to appeal such ruling, was required to "await * * * the decision of the lower court as to what, if any, penalty or remedy it chose to impose or adopt" for non-compliance (Lever motion, 16); and that the Government lost its right to such appeal by requesting the court to change the form of the production orders so as to state the consequences of non-compliance.

We know of no legal principle or policy consideration

In the United States District Court for the District of New Jersey

Civil Action No. 1196–52

UNITED STATES OF AMERICA, PLAINTIFF

against

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Judgment

It appearing to the court that plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcripts of the Grand Jury testimony referred to in the prior Orders of this Court,

Now, therefore, on the record in this case it is

Ordered, adjudged and decreed that, as to the defendant The Procter & Gamble Company, this action be and the same is hereby dismissed.

Dated this 13th day of September 1956.

(S) A. E. MODARELLI,
U. S. District Judge.

In the United States District Court for the District of New Jersey

Civil Action No. 1196–52

UNITED STATES OF AMERICA, PLAINTIFF

against

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Judgment

It appearing that the Plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying by the defendants the transcripts of testimony of witnesses before the Grand Jury of this Court referred to in the order of this Court entered herein on August 21, 1956; after due deliberation, upon all proceedings heretofore had herein, it is

Ordered, adjudged and decreed that, this action be, and the same hereby is dismissed.

Dated: September 13th, 1956.

(S) A. E. MODARELLI,
United States District Judge.

[Order dismissing complaint as to Colgate-Palmolive Company.]

which tends to support such a harsh and arbitrary result. On the contrary, we think that since the Attorney General is charged with protecting the public interest in the conduct of Government litigation, it was eminently proper for him to suggest an amendment designed to put the production order "in proper posture for review on appeal" (J.A. 34), *i.e.*, the posture where review of this important public question could be had without requiring the chief law enforcement officer to sacrifice an important public interest (see *supra*, pp. 2-3).

2. Appellees argue (Procter motion, 18-19; Colgate motion, 21-24; Lever motion, 14-17, 19-20) that permitting appeal under the circumstances of this case would lead to review of interlocutory orders. The argument is that "any plaintiff who objects to an interlocutory order will be able to take a nonsuit or obtain a voluntary dismissal under Rule 41(a), and by appealing from the dismissal order will be able to obtain review of the interlocutory order" (Lever motion, 14; see Proctor motion, 21-22). This contention, which rests upon the erroneous premise that the Government invited dismissal by proposing the amendment (see *supra*, pp. 2-5), is without merit.

If the production orders as originally entered had provided for dismissal in case of non-compliance, the Government could have appealed a judgment of dismissal entered as a result of non-compliance, and could have tested the production order on such appeal. Cf. *United States* v. *Cotton Valley Operators Committee*, 339 U.S. 940 (affirmed by an equally divided court). Similarly, if the original orders had not been amended and the court upon non-compliance had dismissed on

United States District Court for the District of New Jersey

Civil Action No. 1196–52

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Order

It appearing that Plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcripts of the Grand Jury testimony referred to in the Order of this Court as amended on August 21, 1956,

Now, therefore, upon consideration of all of the prior proceedings had herein, it is

Ordered, adjudged and decreed that, this action be, and the same is hereby dismissed.

(S) A. E. MODARELLI,
U. S. D. J.

Dated: September 13, 1956.

[Order dismissing complaint as to Lever Brothers Company.]

In the United States District Court for the District of New Jersey

Civil Action No. 1196–52

UNITED STATES OF AMERICA, PLAINTIFF

against

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., DEFENDANTS

Judgment

It appearing to the Court that Plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcript of the Grand Jury testimony referred to in the prior orders of this Court,

Now, therefore, on the record in this case it is

Ordered, adjudged and decreed that, as to the defendant, The Association of American Soap and Glycerine Producers, Inc., this action be and the same is hereby dismissed.

(S) A. E. MODARELLI,
U. S. D. J.

Dated: September 13th, 1956.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 25 1957
JOHN T. FEY, Clerk

No. 609 51

In the Supreme Court of the United States

OCTOBER TERM, 1956 57

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
JOSEPH E. McDOWELL,
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 609

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Appellees have moved to dismiss or affirm on the ground that the United States, by requesting the district court to amend its earlier orders for the production of documents (entered over the Government's vigorous objection) so as to provide that noncompliance would result in dismissal of the action, thereby invited or consented to dismissal.[1] We submit,

---

[1] In addition, appellee Colgate-Palmolive Company ("Colgate") has moved to affirm on the ground that the district court properly exercised its discretion in requiring disclosure of the grand jury transcript (Colgate motion, pp. 25-33). We shall not discuss that contention, since we believe that the importance of the substantive issues presented by this appeal is adequately set forth in our jurisdictional statement.

however, that the Government's proposal of this amendment shows neither invitation nor consent to dismissal.

1. The district court's original orders of July 24, 1956 directed disclosure of the transcript within 30 days, without specifying what the consequence of non-disclosure would be. If the Government had failed to comply with those orders, the district court, under Rule 37(b) of the Federal Rules of Civil Procedure, could have dismissed the action, issued a citation for contempt, stayed the proceedings until the Government complied, or barred the Government from using the transcript in preparing its case.

The Government's motion of August 15 requested the court (1) to amend the disclosure order to provide that, if production were not made, the court would dismiss the complaint, or, alternatively, (2) if amendment were denied, to stay the order pending the filing of an appeal therefrom or an application for an extraordinary writ (J.A. 24).[2] The Government explained to the court that it was proposing the amendment in order to avoid requiring the Attorney General to choose among several alternatives, each of which would "involve a serious violation of an important public interest" (J.A. 34-35; see J.A. 27-30). Thus, compliance with the production order would have entailed breach of grand jury secrecy

---

[2] Lever Brothers Company ("Lever") now states (motion, p. 13) that, if the Government had sought review by way of extraordinary writ (as Lever claims it should have), "[t]here can be little doubt that it would have obtained a stay from either the trial judge or this Court." However, in the district court Lever "subscribe[d]" (J.A. 39) to a written statement filed by appellee The Procter & Gamble Company ("Procter") (in response to the Government's motion) which stated (J.A. 32) that Procter would have opposed the Government's alternative request for a stay.

and its maintenance, the Attorney General had concluded, was required in the public interest; noncompliance would have placed the Government's chief law enforcement officer in the unseemly position of disobeying an outstanding court order; and voluntary dismissal, in order to avoid either of these alternatives, would have meant sacrificing the broad public interest in obtaining a determination of the violation of the antitrust laws charged in the complaint and appropriate relief. The Government further pointed out (J.A. 31) that the alternative relief of staying the production order "would similarly avoid placing the Attorney General in the position of having to disobey an outstanding court order as a condition of testing its validity," and that neither alternative would prejudice the defendants (J.A. 30-31).

By proposing the amended order, the Government neither acquiesced in the court's prior ruling directing disclosure (to which it has consistently objected), nor consented to or invited dismissal of the complaint.[3] It merely suggested that the court clarify its original order to make explicit the particular sanction which would follow non-disclosure. The ultimate decision whether so to amend the order was of course for the court, and the court could have denied the motion even though all the parties favored it. Furthermore, appellees, far from opposing the Government's proposal to specify the consequences of non-disclosure, either on the ground that the sanction should not be determined

[3] Government counsel stated at the hearing on the motion that "in requesting this amendment of the order we are not in any way waiving any rights to challenge the substance of the ruling on appeal" (J.A. 36).

its own motion, the production ruling could have been tested on appeal from such dismissal. Cf. *Colton Valley* case, *supra*. These are applications of the general principle that where, as a result of non-compliance with an interlocutory order, a court enters a final judgment of dismissal, review of the latter necessarily embraces review of the earlier order upon which it depends. There is nothing to make the principle any less applicable here.

In the instant case, the judgments of dismissal are final orders, and therefore reviewable, because they "ended this suit so far as the District Court was concerned." *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794-795, note 1. They are no less final because their validity depends upon an earlier interlocutory order. Appellees' basic quarrel is with the fact that the district court accepted the Government's suggestion, in which they acquiesced, that dismissal, rather than some other sanction, be specified as the consequence of non-compliance.

In determining the appealability of the final judgments of dismissal, we submit that it is immaterial that the prior production orders were amended on the Government's motion to provide that, if production were not made, the court would dismiss the complaint rather than impose some other sanction. Here, as in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794-795, n. 1, "[t]he record fails to sustain appellees' contention that the Government invited the court to enter this order * * * dismissing the action." It is therefore respectfully submitted that the motions to dismiss or affirm should be denied, and that this Court should note

probable jurisdiction and decide the important public questions which the appeal presents.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
JOSEPH E. MCDOWELL,
Attorneys.

JANUARY 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 414403 778

missal of the complaint which followed such non-compliance.

2. Whether appellees had shown "good cause" (under Rule 34 of the Federal Rules of Civil Procedure) for the production of the grand jury transcript.

STATEMENT

This is an appeal from orders of the district court dismissing a civil suit filed by the United States under Section 4 of the Sherman Act, charging violations of Sections 1 and 2 of that Act, in the soap and synthetic detergent industry. The ground of dismissal was the Government's refusal to permit appellees to inspect and copy a grand jury transcript in the Government's possession.

Between May, 1951 and November, 1952 a federal grand jury sitting in New Jersey investigated possible violations of the antitrust laws in the soap and synthetic detergent industry (R. 207). No indictment was returned, but on December 11, 1952, the United States filed a civil suit against the three major soap and synthetic detergent manufacturers—The Procter & Gamble Company ("Procter"), Colgate-Palmolive Company ("Colgate"), and Lever Brothers Company ("Lever")—and an industry trade association (R. 1–16). The complaint charged that since 1926 the defendants (appellees here) had conspired to restrain and monopolize interstate commerce in the production and sale of soap and synthetic detergents, in violation of Sections 1 and 2 of the Sherman Act; and that Procter, Lever and Colgate also had monopolized a part of that com-

merce, in violation of Section 2 of the Act (R. 9). The complaint set forth in considerable detail the means by which appellees had carried out the conspiracy and monopolization (R. 9–13).

During the course of extensive pretrial proceedings, the Government informed appellees in great detail of the facts upon which it was relying, and also disclosed to them a substantial portion of its evidence.[1] In connection with motions for inspection of the manufacturing appellees' documents, the Government submitted to appellees (at the court's suggestion, R. 227–229) Tentative Statements of Issues of Fact. These Statements set forth in considerable detail the purported facts upon which the Government was relying, but did not indicate the evidence which the Government would offer. At the hearing on the Government's motions, the court reviewed some of the Statements and stated that many of them provided appellees with sufficient information with respect to the Government's case to enable them to prepare their defense, and also showed the relevancy of the documents which the Government was seeking to inspect (R. 232–235). However, in view of appellees' contention that the statements of issues were too general, the court ruled that appellees could obtain further particularization by filing questions with respect thereto (R. 236).

[1] Thus, in July, 1953 the Government consented to an order permitting appellees to copy all documents in its possession which it had obtained from third persons (except where the latter objected to disclosure) (R. 70, 72).

Procter, Lever and Colgate then filed exhaustive written questions concerning the statements of issues (R. 236–238). The court sustained in part the Government's objections to some of the questions, and ruled that the Government "need not designate the documents relied upon or set forth the substance of its evidence of the alleged facts" (R. 238). In May, June and July, 1955, the Government filed detailed answers to questions propounded by appellees (R. 239–240).[2]

On September 24, 1954 (prior to the Government's submission of its Tentative Statements of Issues), Procter had filed a motion for discovery of the entire grand jury transcript (R. 118). The motion was not pressed, however, until more than a year later, when it was revived in response to the Government's effort to take the deposition of Siddall, a vice president of Procter. In September 1955, the Government called for Siddall's testimony to determine whether Procter had complied fully with previous production orders (Government's motion to compel answers, not printed, Tr. 1045; court's letter to counsel, not printed, Tr. 1141). Procter objected to the deposition unless the grand jury transcript was made available to it, pursuant to its motion of September 24 of the previous year[3] (Motion to postpone or limit deposition, not

[2] The tentative statements (Tr. 364–371, 607–610, 611–615, 790–794) and the answers to questions propounded by appellees (Tr. 616–628, 630–665, 667–683, 732–734, 736–742, 744–747, 986–994, 996–1004, 1006–1032) comprise 134 legal size pages of the unprinted record.

[3] Alternatively, Procter suggested that the testimony of Siddall and its other officials be made available (Motion to postpone or limit deposition, *supra;* brief in support thereof, not printed, Tr. 2017).

printed, Tr. 1034). At the deposition hearing, Siddall refused to answer any questions dealing with matters "about which he was asked, or matters which were presented to the grand jury, until such time as relevant portions of the grand jury transcript are available" (Royall's statement at deposition, not printed, Tr. 1116). The Government then moved for an order compelling Siddall to answer and in its brief in opposition, dated November 9, 1955, Procter for the first time urged a hearing on its motion to inspect the grand jury transcript (Brief in opposition to motion to compel answers, not printed, Tr. 2037–2038).

On November 25, 1955, the court ordered Siddall to answer all but five of the questions. At the same time it stated that it would hear the pending motion for production of the grand jury transcripts. Three days later the other appellees filed similar motions for discovery of the entire grand jury transcript[4] (R. 128, 133, 134).

The Government opposed the motions, but after argument the court on April 17, 1956, ruled that appellees were entitled to inspect and copy the entire transcript (R. 207). The court held (R. 213; see R. 208) that production of the grand jury transcript would serve the "ends of justice"; and that the defendants thus had shown "good cause" (within the meaning of Rule 34) therefor, because (1) the Gov-

[4] The Procter, Lever and Association motions apparently were filed under Rule 34 of the Federal Rules of Civil Procedure. Colgate's motion was filed under Rule 6 (e) of the Federal Rules of Criminal Procedure (R. 183).

LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
MAR 1 1 1958
JOHN T. FEY, Clerk

No. 51

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
W. LOUISE FLORENCOURT,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes and rules involved	2
Questions presented	5
Statement	6
Summary of argument	11
Argument	17
I. By proposing the amended order, the Government neither invited, nor consented to, dismissal o the complaint	17
II. The district court erred in directing production of the grand jury transcript	31
Conclusion	52

CITATIONS

Cases:

Alltmont v. *United States*, 177 F. 2d 971, certiorari denied, 339 U. S. 967	37
Costello v. *United States*, 350 U. S. 359	38
Daley v. *Sears, Roebuck & Co.*, 90 F. Supp. 562	29
Federal Baseball Club v. *National League*, 259 U. S. 200	25
Frey & Son v. *Cudahy Packing Co.*, 256 U. S. 208	25
Goodman v. *United States*, 108 F. 2d 516	15, 40, 42, 43
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322	13, 29
Hickman v. *Taylor*, 329 U. S. 495	14, 17, 31, 34–37, 45, 46, 47, 49, 52
Jencks v. *United States*, 353 U. S. 657	34, 43
Kaiser Aluminum & Chemical Corporation v. *United States*, Court of Claims, No. 102–54, Jan. 15, 1958	34
Molloy v. *Trawler Flying Cloud*, 10 F. R. D. 158	38
Margeson v. *Boston & Maine Railroad*, 16 F. R. D. 200	49
Martin v. *Capital Transit Co.*, 170 F. 2d 811	45
McGill v. *Commercial Union Assur. Co.*, 5 F. 2d 589	25
Petroleum Industry Investigation, In re, 152 F. Supp. 646	51
Randazzo v. *United States*, 300 Fed. 794	39

Cases—Continued

	Page
Roviaro v. *United States*, 353 U. S. 53	41
Safeway Stores v. *Reynolds*, 176 F. 2d 476	48
Schmidt v. *United States*, 115 F. 2d 394	39
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U. S. 574	39
Thomsen v. *Cayser*, 243 U. S. 66	12, 23–25, 26, 27, 28
United States v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254	40
United States v. *Babbitt*, 104 U. S. 767	27, 28
United States v. *Cotton Valley Operators Committee*, 339 U. S. 940	12, 21, 22
United States v. *Darling*, N. D. Ill., Civil Action No. 52 C 1716, unreported	42
United States v. *Deere & Co.*, 9 F. R. D. 523	38, 41
United States v. *Garsson*, 291 Fed. 646	38
United States v. *General Motors Corp.*, 15 F. R. D. 486	40, 43, 48
United States v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197	43
United States v. *Johnson*, 319 U. S. 503	38, 43
United States v. *Maryland & Virginia Milk Producers' Assn.*, D. D. C., Civil Action No. 4482–56, unreported	42
United States v. *Morgan*, S. D. N. Y., Civil Action No. 43–757, unreported	43
United States v. *Procter & Gamble Co.*, 14 F. R. D. 230	52
United States v. *Radio Corporation of America*, 21 F. R. D. 103	42
United States v. *Remington*, 191 F. 2d 246, certiorari denied, 343 U. S. 907	39
United States v. *Reynolds*, 345 U. S. 1	34
United States v. *Rose*, 215 F. 2d 617	15, 39, 44
United States v. *Singer*, 19 F. R. D. 90	38
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	32, 39, 44, 53
United States v. *Southmayd*, 27 Fed. Cas. 1275, No. 16,361	39
United States v. *Standard Oil of California*, S. D. Calif., Civil Action No. 11584–C, unreported	42
United States v. *Wallace & Tiernan Co.*, 336 U. S. 793	12, 22, 29, 30
United States v. *Zucca*, 351 U. S. 91	21, 22
Young v. *United States*, 214 F. 2d 282	39

Statutes and Rules:

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2 and 4):

	Page
Section 1	2, 50
Section 2	2, 50
Section 4	2, 50

Federal Rules of Civil Procedure (28 U. S. C.):

Rule 26 (b)	31
Rule 34	3, 14, 16, 31
Rule 37	3, 11, 20
Rule 41	4

Federal Rules of Criminal Procedure (18 U. S. C.):

Rule 6 (e)	4, 31, 38

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey granting appellees' motions to compel production of grand jury transcripts (R. 206) and denying the Government's motion for reconsideration (R. 257) are reported at 19 F. R. D. 122 and 247, respectively.

JURISDICTION

The judgments of the district court dismissing the complaint were entered on September 13, 1956 (R. 325–327), and the notice of appeal was filed in that court on October 4, 1956. This Court, on February 25, 1957, postponed further consideration of its juris-

diction to the hearing on the merits (R. 565). The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29) as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

STATUTES AND RULES INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in

equity to prevent and restrain such violations. * * *

The pertinent provisions of the Federal Rules of Civil Procedure (28 U. S. C.) as amended December 27, 1946, and promulgated under the authority of 28 U. S. C. 2072, are as follows:

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, * * * not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control * * *.

Rule 37. Refusal to Make Discovery: Consequences.

* * * * *

(b) Failure to Comply with Order.

* * * * *

(2) Other Consequences. If any party * * * refuses to obey * * * an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing * * *, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that * * * the contents of the paper * * * or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, * * *

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders * * *.

Rule 41. Dismissal of Actions.

* * * * *

(b) Involuntary Dismissal: Effect Thereof. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 6 (e) of the Federal Rules of Criminal Procedure (18 U. S. C.) promulgated under the authority of 18 U. S. C. 3771, is as follows:

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the

vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

QUESTIONS PRESENTED

Following a federal grand jury investigation of possible criminal violations of the Sherman Act, in which no indictment was returned, the United States filed a civil suit under that Act. During pretrial proceedings, the district court directed the United States to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who appeared before the grand jury. When the United States refused to permit such inspection, the court dismissed the suit. The following questions are presented:

1. Whether the United States, by proposing that the court amend its original order directing disclosure of the grand jury transcript to provide that the consequence of non-compliance would be dismissal of the complaint, thereby invited, or consented to, the dis-

ernment "has used and will continue to use the transcripts while preparing for trial" (R. 213), (2) "the transcripts would be useful to defendants during their preparation for trial" (*ibid.*) and (3) the defendants could not otherwise obtain the information (R. 217). The court further held (R. 213–214) that none of the reasons commonly given for maintaining the secrecy of grand jury proceedings was applicable in this case.

After further proceedings, set out in detail below, *infra*, pp. 18–20, the court, on August 21, 1956, entered an amended order which provided that unless the United States, on or before August 24, 1956, produced at the offices of the Department of Justice, and permitted each of the defendants or their counsel to inspect and copy, "all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the Grand Jury, the Court will enter an order dismissing the complaint herein" [5] (R. 322).

The United States did not produce the grand jury transcript for inspection and copying, and on September 13, 1956, the district court entered judgments dismissing the complaint because of such non-production (R. 325–327).

---

[5] The court's original order, entered on July 24, 1956, directed the United States to permit the defendants to inspect and copy the grand jury transcript within 30 days, but did not state the consequences of non-compliance. The circumstances surrounding the amendment of the order upon the Government's motion are set forth in the Argument, *infra*, pp. 18–20.

SUMMARY OF ARGUMENT

I. The district court's original production orders directed the United States to produce within 30 days the entire grand jury transcript. Prior to expiration of that period, the Government filed a motion requesting the court to amend the orders to provide that, if production were not made, the court would dismiss the complaint. The Government explained that it was proposing the amendment to avoid requiring the Attorney General to choose between alternatives which would "involve a serious violation of an important public interest." Thus, it was pointed out that non-compliance would place the Government's chief law enforcement officer in the position of disobeying an outstanding court order, while voluntary dismissal of the case would mean sacrificing the broad public interest in securing determination of the issues raised by the antitrust complaint.

The defendants did not oppose the amendment, and the court entered an amended order as proposed by the Government. The Government did not produce, and as a consequence the court entered its judgments of dismissal, from which this appeal is taken.

We submit that in proposing amendment of the order to specify that the consequence of non-compliance would be dismissal of the complaint, rather than one of the other remedies which the court could have utilized under Rule 37 (b) of the Federal Rules of Civil Procedure (such as citation for contempt), the Government neither invited, nor consented to, the dismissal which followed such non-production.

A. When the Government filed its motion for amendment, the court had long since decided the substantive issue against the Government, *i. e.*, it had determined to compel disclosure of the grand jury transcript. The only remaining issue was what the consequence of non-disclosure would be. In proposing the amended order, the Government did no more than ask the court to specify in advance what the consequence would be, and to suggest that dismissal of the complaint rather than some other measure would be the appropriate remedy. As the court itself recognized, the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith.

If the production order as originally entered had provided for dismissal in case of non-compliance or if, without amendment of the order, the court on its own motion had dismissed following non-compliance, the Government unquestionably could have appealed such dismissal. Cf. *United States* v. *Cotton Valley Operators Committee,* 339 U. S. 940; *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793, note 1 at 794–795. The result should be no different because the court selected dismissal as the consequence of non-compliance (instead of one of the other measures authorized by Rule 37 (b)) at the Government's suggestion.

B. *Thomsen* v. *Cayser,* 243 U. S. 66, fully supports our contention that the United States did not consent to dismissal of the complaint by proposing the amended order. There, on rehearing, the court of

appeals, after having first reversed a trial court judgment in favor of plaintiffs and remanded for a new trial, entered final judgment directing dismissal of the complaint. This was done at plaintiff's request in order to expedite an appeal to this Court. This Court in turn held that plaintiffs had not consented to a judgment against them "but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay" (243 U. S. at 83).

Similarly, in the instant case the United States did not consent to the ruling on production (which it strenuously opposed), but sought only a specification of the remedy which the court would select in case of non-compliance. Here, as in *Thomsen,* the proposed change went only to the form of the judgment, and not to the substance of the adverse ruling.

C. Appellees argue that permitting appeal would permit review of interlocutory orders, on the theory that any party objecting to an interlocutory order could take a voluntary non-suit and then obtain review thereof by appealing from the dismissal. But the argument rests on the erroneous assumption that the Government consented to dismissal by proposing the amended order.

The orders of dismissal were final orders because they ended the case, and review thereof necessarily also embraces review of the earlier interlocutory orders upon which the final orders rest. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322.

II. The bases of the district court's holding that appellees had shown "good cause" (within the mean-

ing of Rule 34 of the Federal Rules of Civil Procedure) were (1) that the Government was using the transcript in preparing the civil case for trial; (2) that the transcript would be "useful" to appellees in their trial preparation; and (3) that "none of the reasons" for maintaining the traditional secrecy of grand jury transcripts was applicable in this case. We believe that these rulings rest upon a misconception of both the "good cause" standard under Rule 34 and the policy upon which grand jury secrecy rests.

A. In *Hickman* v. *Taylor*, 329 U. S. 495, this Court enunciated the standards governing discovery in situations where there are strong public policies weighing against disclosure. It ruled that, because of the "well recognized" "policy against invading the privacy of an attorney's course of [trial] preparation," discovery of his "work product" might be had only upon a showing that "relevant and non-privileged facts" whose "production * * * is essential to the preparation of one's case" would otherwise "remain hidden in an attorney's file", or that "the witnesses are no longer available or can be reached only with difficulty" (pp. 511, 512).

The public policy against breaching the secrecy of grand jury proceedings is certainly no less strong than the policy of preserving the privacy of a lawyer's "work product." It has been an historic principle that grand jury proceedings shall be conducted in secrecy and without subsequent exposure of the testimony taken. One of the basic reasons for maintaining that secrecy is "to encourage free and

untrammeled disclosures by persons who have information with respect to the commission of crimes" (*United States* v. *Rose*, 215 F. 2d 617, 628 (C. A. 3)). That policy applies no less because the grand jury has been discharged without returning an indictment.

Grand jury witnesses frequently testify as informers, and they obviously would be less likely to do so if such testimony were to be made public. This consideration is particularly significant in the antitrust field where the witnesses frequently are persons who, because of their economic relationships with, and dependence upon, business firms under investigation, might hesitate to speak freely if their testimony were likely to be revealed. Indeed, in this case 24 of the 28 grand jury witnesses were past or present officers or employees of appellees, or were connected with firms which presumably had some business relationships with them.

In recognition of this important policy that grand jury secrecy must be maintained so "that those who testify may feel free to speak the truth without reserve" (*Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9)), the courts (except for the decision below) consistently have rejected attempts by the defendants in Government civil antitrust cases to obtain wholesale discovery of grand jury transcripts. Even in a criminal case, a defendant can obtain the transcript only upon a clear showing that "strict application" of the traditional secrecy rule "would defeat the ends of justice" (*United States* v. *Rose*, *supra*), and he then obtains disclosure only to the extent clearly necessary.

A fortiori, disclosure of grand jury testimony may be ordered in a civil case only if a party makes an unusually strong, and a particularized, showing that he cannot effectively try his case without breaching such secrecy. Appellees, though they seek the entire transcript, have utterly failed to make any showing of need.

C. Appellees' bare allegations that the "information" contained in the transcript is "necessary" to their defense and that "pertinent" matters would not become known unless access thereto were granted, plainly were insufficient to establish "good cause." Since such stereotyped "showings" could always be made, treating them as sufficient to justify production would read the "good cause" requirement out of Rule 34.

The claim that "no practicable alternative to such discovery exists" has no support in the record. Appellees could have obtained all pertinent facts without recourse to the grand jury transcript. The Government had furnished appellees with lengthy and detailed statements of the facts upon which it was relying, and had disclosed to them a substantial portion of its documentary evidence. Appellees conceded that they knew the identity of "most if not all" of the witnesses who had appeared before the grand jury, and the Government had offered to disclose their names. There was no showing that those witnesses were unavailable, or that appellees could not interview them, or take their depositions, or that they had not done so. Indeed, most of the appellees conceded that they could take such depositions.

The situation here is comparable to *Hickman* v. *Taylor, supra,* 329 U. S. at p. 509, where, "[f]or aught that appears, the essence of what petitioner seeks either has been revealed to him already * * * or is readily available to him direct from the witnesses for the asking." Indeed, it appears that what appellees were seeking through discovery of the grand jury transcript was not to ascertain the facts upon which the Government's case was based (since they either already had such facts or could readily obtain them), but to ascertain exactly how prospective witnesses had cast their testimony.

Appellees have not shown that their case is the "rare situation justifying production" (*Hickman* v. *Taylor, supra,* at p. 513) of traditionally secret grand jury transcripts. The standard of "good cause" applied by the district court in this case—that the transcript would be "useful" to appellees in preparing for trial—would permit such easy and unlimited access to grand jury transcripts as seriously to interfere with the effective functioning of the grand jury as a law enforcement institution.

ARGUMENT

I. BY PROPOSING THE AMENDED ORDER, THE GOVERNMENT NEITHER INVITED, NOR CONSENTED TO, DISMISSAL OF THE COMPLAINT

Appellees contend (Proctor Motion to Dismiss or Affirm, pp. 8–19; Colgate Motion to Dismiss or Affirm, pp. 8–24; Lever Motion to Dismiss or Affirm, pp. 2, 9–16, 21–23; Association Motion to Dismiss or Affirm,

pp. 2–3) that the United States, by requesting the district court to amend its earlier orders directing production of the grand jury transcript (entered over the Government's vigorous objection) to provide that non-production would result in dismissal of the action, thereby invited or consented to dismissal. Discussion of this contention requires a brief statement of the circumstances surrounding the entry of the amended order.

After the district court had held that the defendants were entitled to inspect and copy the grand jury transcript (R. 218), and had denied reconsideration (R. 261), it entered its original production orders (dated July 23, 1956) (R. 262–267). Those orders merely directed the United States to produce within 30 days, and to permit the defendants to inspect and copy, the entire transcript of the grand jury testimony. The orders did not specify, however, what the consequence of non-disclosure would be.

On August 16, 1956 the Government filed a motion requesting the court (1) to amend the orders of July 24, 1956 to provide that, if production were not made, the court would dismiss the complaint, or, alternatively, (2) if amendment were denied, to stay the order pending the filing of an appeal therefrom or an application for an extraordinary writ (R. 317). The Government explained that it was proposing the amendment in order to avoid requiring the Attorney General to choose among alternatives which would "involve a serious violation of an important public interest" (R. 333). Thus, it was pointed out, non-compliance would place the Government's chief law

enforcement officer in the unseemly position of disobeying an outstanding court order, while voluntary dismissal would mean sacrificing the broad public interest in obtaining a determination of the violation of the antitrust laws charged in the complaint and appropriate relief (*ibid.*). The Government further pointed out (R. 321–322) that the alternative relief of staying the order "would similarly avoid placing the Attorney General in the position of having to disobey an outstanding court order as a condition of testing its validity," and that neither alternative would prejudice the defendants.

The defendants did not oppose the Government's proposed amendment (R. 324, 334–336), and the court entered an amended order providing that, unless the Government produced the transcript by August 24, 1956, "the Court will enter an order dismissing the complaint herein" (R. 323).

On September 6, 1956, the court sent a letter to all counsel inquiring whether the Government had produced "as directed in the last paragraph of the amended order," and stating that "[i]f the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (R. 361). In response, the Government advised the court "that plaintiff has not produced the grand jury transcripts for inspection by the defendants" (R. 362).

On September 13, 1956, the court entered separate judgments of dismissal as to each defendant, which recited that the plaintiff had failed to produce the grand jury transcript referred to in the amended

order (R. 325–328). It is from those judgments of dismissal that this appeal has been taken.

We submit that the foregoing facts show that in proposing the amendment of the order to specify that non-production would result in dismissal of the complaint, rather than some other consequence (*e. g.*, a contempt proceeding), the Government neither invited, nor consented to, the dismissal which followed such non-production.

A. When the Government filed its motion for amendment of the production orders, the court had long since decided the substantive question against the Government, *i. e.*, it had determined to compel disclosure of the grand jury transcript. The only remaining issue was what the consequence of non-disclosure would be. Under Federal Rule of Civil Procedure 37 (b), the court could have taken various measures, including "staying further proceedings until the order is obeyed," dismissing the action, arresting Government counsel for disobedience, or citing them for contempt. But since the orders gave the Government 30 days within which to produce, final selection of the appropriate measure awaited the expiration of that period.

In proposing the amended order, the Government did no more than (1) ask the court to state in advance what the consequence of non-compliance would be, and (2) suggest an appropriate measure, namely, dismissal of the complaint rather than the stay of further proceedings, arrest or citation for contempt. It distorts the whole chronicle of events to construe

the Government's suggestion as either an invitation or consent to the dismissal which actually followed non-compliance. Contrary to Procter's view (Procter Motion, p. 9), the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith.[6] Indeed, Procter recognized that the Government was not seeking dismissal by proposing the amended order. For it stated that it did not oppose the Government's "proposed relief of production *or* dismissal" (R. 324, 334, emphasis added).

If the production orders as originally entered had provided for dismissal in case of non-compliance, unquestionably the Government could have appealed a judgment of dismissal entered as a result of non-compliance, and could have tested the production order on such appeal. Cf. *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940 (affirmed by an equally divided court); *United States* v. *Zucca*,

[6] Although Lever states (Motion, pp. 9, 21) that the dismissal orders were not imposed by the court as a remedy for non-compliance, the court itself viewed such orders as resulting from the Government's non-production, not from invitation or consent to dismissal. Thus, on September 6, 1956 (after the time for production had expired), the court sent a letter to all counsel inquiring whether the Government had produced "as directed in the last paragraph of the amended order," and stating that "[i]f the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (R. 361). Similarly, the judgments of dismissal themselves recite that the complaint was being dismissed because the Government had not produced (R. 325–328).

351 U. S. 91.[7] Similarly, if the original orders had not been amended and the court, upon non-compliance, had dismissed on its own motion, the production ruling could have been tested on appeal from such dismissal. Cf. *Cotton Valley* case, *supra; United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, n. 1 at 794–795. The result should be no different because the court indicated in advance that it would adopt the Government's suggestion (in which appellees acquiesced) and specify dismissal as the consequence of non-compliance (instead of one of the other measures authorized by Rule 37 (b)). The decision thus to amend the order was made by the court, not by the Government; and the court, of course, could have rejected the Government's proposed amendment, either on the ground that the suggested measure was inappropriate, or that it should not be announced prior to non-compliance.

---

[7] In *Cotton Valley*, the district court directed the Government to produce FBI reports and, when the Government refused to do so, dismissed the complaint for failure to comply with the production order (Record on appeal, No. 490, Oct. Term, 1949, pp. 213–218, 220). The Government appealed from the judgment of dismissal, and this Court noted probable jurisdiction (*id.* p. 267). In *Zucca*, the district court entered an order dismissing the Government's complaint in a denaturalization proceeding for failure to file an affidavit of good cause, on condition that if within 60 days the Government filed such affidavit the complaint would be reinstated. The Government did not file the affidavit, and the court then entered a final order of dismissal, from which the Government appealed. Record on appeal, No. 213, Oct. Term 1955, pp. 20, 22. The court of appeals and this Court upheld the dismissal on the merits.

Procter's argument (Procter motion, p. 10) that the Government's proposed amendment was "intended to result in the dismissal of the action and nothing less" misses the point. For it was so intended only in the sense that the Government sought specification that dismissal, rather than some other measure, would be the consequence of non-compliance with orders that the Government consistently opposed as invalid.

B. *Thomsen* v. *Cayser*, 243 U. S. 66, fully supports our contention that the United States did not consent to dismissal of the complaint by proposing the amended order.

In *Thomsen*, the court of appeals had reversed a judgment in favor of plaintiffs entered in a private treble damage antitrust suit, on the ground that, under decisions of this Court, the plaintiffs had not established a violation of the Sherman Act. However, since those decisions had been rendered subsequent to a contrary ruling by the court of appeals in a prior appeal in the case, which ruling the plaintiffs had followed in trying their law suit, the court concluded that it would be unduly prejudicial to plaintiffs to reverse with instructions to dismiss. Accordingly, it remanded for a new trial.

Plaintiffs sought rehearing. They requested that, instead of a judgment for a new trial, "judgment final be rendered upon the record, or questions of law, such as are presented by the case upon the record as it stands, be certified to the Supreme Court for final decision" (Record on Appeal, *Thomsen* v. *Cayser*, No. 2, October Term, 1916, p. 209). The court of appeals,

stating that plaintiffs "prefer[red] instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint in order that they [might] carry the case to the Supreme Court without further delay" (*id.*, p. 210), granted rehearing, recalled the mandate, and reversed the judgment with instructions to enter an order dismissing the complaint (*id.*, p. 211; see 243 U. S. 66 at 76). The court of appeals then allowed a writ of error to this Court.

Defendants moved in this Court to dismiss the writ of error on the ground, *inter alia*, that the "judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent" (243 U. S. at 82).[8] This Court, however, summarily denied the motion to dismiss, holding that

> The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might

[8] Defendants contended: "[P]laintiffs insist that the judgement [of the trial court] should have been affirmed: but do not claim that, if it was right to reverse the judgment, it was wrong to direct a dismissal instead of a new trial. Indeed they were estopped from doing so, because this substitution was at their instance and with their assent. They made known to the Court, after it had ordered a new trial, that they preferred a dismissal, and the Court made the substitution accordingly." [Supplemental Brief for Defendants in Error on Reargument, p. 3.]

come to this court without further delay. [243 U. S. at 83.] [9]

Similarly, in the instant case the United States did not consent to the ruling on production (which it opposed throughout the proceedings), but sought only a specification as to what the consequence of non-compliance would be. The Government repeatedly emphasized to the court that it strongly opposed the court's ruling directing disclosure of the grand jury transcript, and it advised the court, when the original production orders were entered, that it would decline to produce (R. 330). Moreover, it emphasized that, in proposing the amended order, it was not "waiving any rights to challenge the substance of the ruling on appeal," but was "merely trying to change the form of the order, to put it in terms that we can get effective appellate review of the order without being in the position of having to disobey the order as a condition to testing it" (R. 334). The Government's proposal thus went only to the form of the judgment, not its substance.

Indeed, this is an even stronger case than *Thomsen* v. *Cayser* for holding that there was no consent to dismissal. For there the plaintiffs proposed a change in the form of the order merely "so that they might come to this court without further delay" (243 U. S. at 83). In the instant case, however, the Government proposed a change in the form of the order

[9] The same procedure was upheld in *Federal Baseball Club* v. *National League*, 259 U. S. 200, 208, and *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208, 210. See, also, *McGill* v. *Commercial Union Assur. Co.*, 5 F. 2d 589, 591 (C. A. 4).

not to expedite an appellate ruling, but to further the public interest by avoiding the "unseemly position" of requiring the country's chief law enforcement official to choose among alternative courses of conduct, each of which would have "involved [d] a serious violation of an important public interest" (R. 333-334; see *supra,* pp. 18–19). Furthermore, in *Thomsen* the judgment of dismissal was entered as the direct result of the plaintiff's motion to amend, whereas in the instant case, as the court's own statements make clear (see *supra,* n. 6, p. 21), dismissal resulted from the Government's noncompliance with the amended order rather than from its proposal to amend.

It is immaterial that in *Thomsen* the plaintiffs sought a change in a judgment which had finally disposed of the case, whereas here the Government sought a change in a judgment to indicate what such disposition would be. The significant fact in *Thomsen* is that since the court already had decided the substantive issue adversely to the plaintiffs, the latter did not waive their rights to appeal from that determination by proposing a change in the form of the judgment in which that determination was reflected. The same reasoning is applicable to the case at bar, and it compels the conclusion that the Government did not waive its right to appellate review of the court's production ruling by proposing a

change in the form of the order in which that ruling was formalized.[10]

Appellees rely (Procter Motion, pp. 15–16; Colgate Motion, pp. 14–15; Lever Motion, p. 23) on *United States* v. *Babbitt*, 104 U. S. 767, to support their contention that the Government invited dismissal by proposing the amended order. There an Army officer brought suit against the United States for military pay on the theory that his service as a West Point cadet was to be counted for longevity purposes. The Court of Claims decided against the officer and filed "an elaborate opinion to that effect" (p. 768). However, "after the decision was announced, a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal" (*ibid.*). This Court affirmed the judgment on the ground that "[t]he consent to the judgment below was in law a waiver of the error now complained of" (*ibid.*).

In *Babbitt*, therefore, the Government consented to a change in the substance, and not just the form, of

---

[10] Appellee Procter seeks to distinguish "[c]ases such as" *Thomsen* v. *Cayser* on the ground that "[t]hey are not regarded as appeals from consent judgments" (Procter Motion, n. 10, pp. 8–9; see Colgate Motion, footnote, p. 15). The reason they are not so regarded, however, is because the proposal to change the judgment went only to its form, not its substance. As we have shown in the text, that also is true in the instant case.

the order. Its effect was to convert a favorable decision into an adverse ruling. Here, however, the Government had lost on the merits (*i.e.*, production had been directed), and it proposed merely a change in the form of the order in which that adverse ruling was reflected. This case, therefore, is controlled by *Thomsen* rather than by *Babbitt*.

C. Appellees argue (Procter motion, 18–19; Colgate motion, 21–24; Lever motion, 14–17, 19–20) that permitting appeal in the circumstances of this case would circumvent the rule against review of interlocutory orders. The argument is that "any plaintiff who objects to an interlocutory order will be able to take a nonsuit or obtain a voluntary dismissal under Rule 41 (a), and by appealing from the dismissal order, will be able to obtain review of the interlocutory order" (Lever motion, 14; see Colgate motion, 21–22).

The argument is without substance, however, because it rests on the assumption that the Government invited or consented to dismissal—an assumption which, as we have shown, is erroneous. An order of dismissal clearly would have been appealable if the in case of non-compliance or if the court, on its own in case of non-compliance or if the court, on its own motion, had so directed (see *supra*, pp. 21–22). In those cases, the Court would review the merits of the production order under the general principle that where, as a result of non-compliance with an interlocutory order, a court enters a final judgment of dismissal, review of the latter necessarily embraces review of

the earlier order upon which it depends. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 346–349, 354. The principle is equally applicable here.

In the instant case, the judgments of dismissal are final orders, and therefore reviewable, because they "ended this suit so far as the District Court was concerned." *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794–795, note 1.[11] They are no less final because their validity depends upon an earlier interlocutory order. Appellees' basic quarrel is with the fact that the district court accepted the Government's suggestion, in which they acquiesced, that dismissal, rather than some other measure, be specified as the consequence of non-compliance.

In final analysis, appellees' contention thus is that because the court initially directed production without specifying the consequence of non-compliance, the Government, in order to appeal such ruling, was required to "await * * * the decision of the lower court as to what, if any, penalty or remedy it chose to impose or adopt" for non-compliance (Lever mo-

[11] They would be appealable even if the dismissals were without prejudice. *Wallace & Tiernan* case, *supra*. We believe, however, that they were with prejudice. Rule 41 (b) provides for "Involuntary dismissal" for "failure of the plaintiff * * * to comply with * * * any order of court," and states that "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule * * * operates as an adjudication upon the merits." Since the court's judgments of dismissal do not specify that they were without prejudice, they were with prejudice. *Daley* v. *Sears, Roebuck & Co.*, 90 F. Supp. 562 (N. D. Ohio).

tion, 16);[12] and that the Government lost its right to such appeal by requesting the court to state the consequences of non-compliance.

We know of no legal principle or policy consideration which would justify such a harsh and arbitrary result. On the contrary, we think that since the Attorney General is charged with protecting the public interest in the conduct of Government litigation, it was eminently proper for him to suggest an amendment designed to put the production order "in proper posture for review on appeal" (R. 332), *i. e.*, the posture where review of this important public question could be had without requiring the chief law enforcement officer to sacrifice an important public interest (see *supra*, pp. 18–19). Here, as in *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794–795, n. 1, "[t]he record fails to sustain appellees' contention that the Government invited the court to enter this order * * * dismissing the action."

---

[12] Lever suggests (Motion, p. 13) that the Government should have sought review of the original production orders by extraordinary writ; and it states (*ibid.*) that, had the Government done so, "[t]here can be little doubt that it would have obtained a stay from either the trial judge or this Court." However, in the district court Lever "subscribe[d]" (R. 336) to a written statement filed by Procter (in response to the Government's motion) which stated (R. 324; see R. 335) that Procter would have opposed the Government's alternative request for a stay.

Lever further suggests (Motion, p. 13) that the Government could have complied with the production order, and tested its validity in connection with review of the final judgment on the merits. But if the Government had complied with the order, the question of its validity obviously would have been moot. Furthermore, compliance would have breached the very grand jury secrecy which the Attorney General had determined the public interest required to be preserved.

II. THE DISTRICT COURT ERRED IN DIRECTING PRODUCTION OF THE GRAND JURY TRANSCRIPT

Rule 34 of the Federal Rules of Civil Procedure provides that upon motion of any party "showing good cause therefor" the court may order a party to produce any documents "not privileged"[13] which constitute or may furnish evidence relevant to the subject matter of the proceeding. See also Rule 26 (b). As this Court stated in *Hickman* v. *Taylor*, 329 U. S. 495, 512, note 10, "Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents." Since the court's discovery order rested on Rule 34,[14] the court did not properly direct production unless appellees had shown "good cause."

---

[13] In connection with the Government's motion for reconsideration, the Attorney General filed in the court below a formal claim of privilege covering the grand jury transcript (R. 247–249), which the district court denied (R. 261–267). We are not here arguing that the transcript is privileged against disclosure, but only that appellees have not shown good cause for its production. But see note 16, *infra*, p. 33.

[14] Colgate's motion for production was filed under Rule 6 (e) of the Federal Rules of Criminal Procedure (R. 133); the other motions presumably were filed under Rule 34 of the Federal Rules of Civil Procedure. However, as Colgate recognizes (R. 142; Colgate Motion to Dismiss or Affirm, p. 25), and as the district court indicated (R. 138), Rule 6 (e) only authorizes the district court to permit disclosure of matters occurring before the grand jury; it does not authorize discovery of the transcript in a civil case. The district court accordingly correctly treated all the discovery motions as requiring a showing of "good cause" under Rule 34.

The district court held (1) that since the Government was using the transcript in preparing for trial, and since the transcript "would be useful to defendants during their preparation for trial," "clearly, the ends of justice will be attained by plaintiff's disclosure of the grand jury testimony, and defendants have shown good cause for the production of the transcripts" (R. 213)[15]; and (2) that "none of the reasons" for the "traditional secrecy" (*ibid.*) of grand jury transcripts "applies in this case" (R. 214; see also the court's opinion on reconsideration, (R. 258). The court further stated (R. 217) that it would not grant discovery if "defendants already possessed all the necessary information or could obtain it by pursuing a different remedy."

We submit that these rulings rest upon a misconception of (1) the "good cause" standard under Rule 34, and (2) the policy upon which grand jury secrecy is based.

---

[15] The court relied on this Court's statement in *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 234, that, after the grand jury's function has ended, disclosure of grand jury testimony is proper "where the ends of justice require it." It stated (R. 208) that "if the ends of justice require disclosure of the grand jury testimony, that is good cause for the production of the transcripts."

The statement in *Socony-Vacuum*, however, was made in rejecting the contention that the district court had erred in a criminal case in permitting the Government to use particular portions of a grand jury transcript to refresh a witness's recollection, without permitting defense counsel to see the transcript. The question here involved is what constitutes "good cause" in a civil antitrust case for discovery of an entire grand jury transcript.

Grand jury proceedings traditionally have been secret, and the courts have zealously protected such proceedings from exposure (see *infra*, pp. 38–40). A party seeking discovery of such material is, we believe, required to make an unusually strong, and a particularized, showing that he cannot effectively try his case without breaching such secrecy. Good cause is not established merely by showing that the Government is using the transcript to prepare for trial, and that it would be "useful" to the defendants to have all of it. We believe that discovery of material contained in a grand jury transcript may be directed in a civil case only upon a clear showing that it is essential to the proper preparation and presentation of the movant's case, and that he either cannot obtain the facts elsewhere, or can do so only with serious hardship. Appellees plainly did not, or even attempt to, make such a showing, albeit they have made a blanket pretrial demand for the transcript.

In determining whether good cause has been established, the character of the material sought is highly significant. If merely routine papers are involved, a lesser showing of need may suffice than if discovery is sought of material with respect to which there are strong policy considerations against permitting discovery. As we shall show, important considerations of public policy dictate against disclosure of the transcript.[16] In the light of these policies, we submit that appellees failed to show good cause.

---

[16] The claim of privilege filed by the Attorney General in the court below attests to the importance which the Government's chief law enforcement officer attached to maintaining the secrecy of the grand jury transcript in this case. It further empha-

The issue of disclosure, as it arises here, is, of course, quite different from the situation where limited access to specific material in the Government's hands is sought *at trial* for purposes of impeaching a witness. See *Jencks* v. *United States*, 353 U. S. 657. Here, appellees have sought access to the entire transcript, long prior to trial, for use in their pretrial preparation, and without any particularized showing of need.

A. In *Hickman* v. *Taylor*, 329 U. S. 495, this Court enunciated the standards governing discovery of material in situations where there are strong public policies weighing against disclosure. There, in a suit for personal injury under the Jones Act, the plaintiff sought to compel production of oral and written statements of witnesses which had been taken by the defendants' attorney shortly after the accident and in anticipation of possible litigation. "No attempt was made to establish any reason why Fortenbaugh [the defendants' attorney] should be forced to produce the written statements. There was only a naked, general demand for these materials as of right * * *" (p. 512). The district court directed production "on the theory that the facts sought were material and were not privileged (as constituting attorney-client com-

---

sizes that appellees were required to make a particularly strong showing of need before they could breach such secrecy. Cf. *United States* v. *Reynolds*, 345 U. S. 1; see the recent opinion of Mr. Justice Reed, sitting by designation on the Court of Claims, in *Kaiser Aluminum & Chemical Corporation* v. *United States*, No. 102–54, Jan. 15, 1958.

munications" (p. 509). This Court, although agreeing that the "memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis" (p. 508), concluded that the district court had erred in directing production.

The Court stated that "permitting discovery in a situation of this nature as a matter of unqualified right" (p. 514) would contravene "the public policy underlying the orderly prosecution and defense of legal claims" (p. 510). It summarized the policy considerations which require preservation of the privacy of a lawyer's "work product" as follows (pp. 510–511):

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the

> "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

In the light of these policies, the Court, although recognizing that "the deposition-discovery rules are to be accorded a broad and liberal treatment" (p. 507), held that the plaintiff had not established "adequate reasons" (p. 512) for production. It noted (p. 508) that plaintiffs sought "statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired"; that such production was sought only "after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident" (*ibid.*); and that the ground upon which production was sought of the oral statements—"to help prepare" petitioner's counsel "to examine witnesses and to make sure that he has overlooked nothing"—"is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type (p. 513)."

The Court emphasized (pp. 511–512) that it was not ruling "that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. * * * And production might be justified where the witnesses are no longer available or can be reached only with difficulty. * * * But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."

The Court of Appeals for the Third Circuit, sitting *en banc* in *Alltmont* v. *United States*, 177 F. 2d 971, 978, certiorari denied, 339 U. S. 967, ruled that, in the light of this Court's opinion in *Hickman* v. *Taylor*, a party seeking to establish good cause under Rule 34 for discovery of written statements of prospective witnesses which were taken for trial counsel's use

> must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and

> interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case. * * *

B. The public policy against breaching the secrecy of grand jury proceedings is certainly no less strong than the policy of preserving the privacy of a lawyer's "work product."[17] It has been an historic principle that grand jury proceedings shall be conducted in secrecy. See *United States* v. *Johnson*, 319 U. S. 503, 513; *Costello* v. *United States*, 350 U. S. 359, 362; compare Judge Learned Hand's opinion in *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y.). Various settled legal principles are designed to protect that secrecy. Thus, grand jurors and Government attorneys, interpreters or stenographers appearing before the grand jury may disclose what occurred there only with court authorization. Rule 6 (e), Federal Rules of Criminal Procedure. Furthermore, the grand jury transcript is not made public save in exceptional circumstances where breach of secrecy is "essential to the attainment of justice and the vin-

[17] Indeed, since the grand jury transcript reflects the legal skill of Government attorneys in preparing and conducting the proceeding, it may in a sense be viewed as their work product. Cf. *United States* v. *Deere & Co.*, 9 F. R. D. 523, 527–528 (D. Minn.); *Molloy* v. *Trawler Flying Cloud*, 10 F. R. D. 158 (D. Mass.); *United States* v. *Singer*, 19 F. R. D. 90, 92–93 (S. D. N. Y.).

dication of truth * * *." *Schmidt* v. *United States*, 115 F. 2d 394, 396 (C. A. 6).[18]

The reasons for maintaining grand jury secrecy were cogently summarized in *United States* v. *Rose*, 215 F. 2d 617, 628 (C. A. 3) as follows:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information

[18] In the federal courts, only three exceptions have been recognized: (1) the transcript may be available in certain circumstances to impeach a witness by showing prior contradictory statements (cf. *Randazzo* v. *United States*, 300 Fed. 794, 797 (C. A. 8); *Young* v. *United States*, 214 F. 2d 232, 239 (C. A. D. C.)) or to refresh his recollection (*United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 234); (2) the defendant may see the transcript where certain types of irregularities in the grand jury proceedings are alleged to have invalidated the indictment (*Shushan* v. *United States*, 117 F. 2d 110, 113 (C. A. 5) certiorari denied, 313 U. S. 574); (3) the defendant may examine his own testimony in a trial for perjury committed before the grand jury (*United States* v. *Remington*, 191 F. 2d 246, 250 (C. A. 2), certiorari denied, 343 U. S. 907; *United States* v. *Rose*, 215 F. 2d 617, 629–630 (C. A. 3)). In addition, disclosure occasionally may be authorized in other situations. See, *e. g.*, *United States* v. *Southmayd*, 27 Fed. Cas. 1275, No. 16,361 (Cir. Ct. E. D. Wisc.) (malicious prosecution where the cause of action is based on the actions of grand jury witnesses in procuring an indictment).

> with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

See, also, *Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9).

In *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D. Md.) (upon which the court relied in *Rose*) the court pointed out:

> It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury. Of course, these latter are intended directly to share in the benefits from this rule of secrecy, * * *.

The importance of protecting the grand jury as an institution was also emphasized by the court in denying production of grand jury transcripts in *United States* v. *General Motors Corp.*, 15 F. R. D. 486, at 487–488 (D. Del.).

The district court held (R. 214) that "none of the[se] reasons for secrecy * * * applies in this case." We think it clear, however, that the fundamental policy of encouraging "free and untrammeled disclosures by persons who have information with respect to the commission of crimes" would be seriously thwarted by permitting disclosure of the grand jury transcript even though the grand jury has been discharged without returning an indictment. Wit-

nesses who appear before the grand jury often testify as informers, and they obviously would be less likely to do so if such testimony were to be made public. This consideration is particularly significant in the antitrust field, where such witnesses frequently are persons who, because of their connection or economic relationships with potential defendants, might hesitate to appear and speak freely before the grand jury if their testimony might later be disclosed and thus subject them to possible economic retaliation. Cf. *United States* v. *Deere & Co.*, 9 F. R. D. 523, 525–529 (D. Minn.). Moreover, unless secrecy were maintained, witnesses might decline to disclose adverse facts about third persons whom they believe to be innocent, or to disclose their own covert relationships with persons of unsavory reputation.[19]

The foregoing policy considerations are particularly applicable to this case. Twenty-four of the 28 witnesses who testified before the grand jury (all of them under compulsion of subpoena) were past or present officers or employees of appellees, or were connected with firms which presumably had some business rela-

[19] These policy considerations are akin to those which underlie the well-established privilege covering the identity of informers: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States*, 353 U. S. 53, 59.

tions with them.[20] Since their economic well-being thus was so closely dependent upon maintaining favorable relations with appellees, those witnesses might have been especially reluctant to speak freely about appellees before the grand jury had they anticipated that such testimony was likely to be made public.

These considerations against breaching grand jury secrecy obviously are equally applicable even though the grand jury had been discharged without returning an indictment.

In recognition of this important policy that grand jury secrecy must be maintained so "that those who testify may feel free to speak the truth without reserve" (*Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9)), the courts (except for the decision below) consistently have rejected attempts by the defendants in Government civil antitrust cases to obtain discovery of grand jury transcripts.[21] Requiring the

[20] Nine were present and nine were former officers or employees; two were representatives of grocery chain stores; two were representatives of oil and chemical companies; one was a representative of a meat packer, and one was a representative of a tallow broker (R. 471–472).

[21] Discovery of grand jury transcripts after discharge of the grand jury has been refused in the following antitrust cases: *United States* v. *Radio Corporation of America*, 21 F. R. D. 103 (E. D. Pa.); *United States* v. *Maryland & Virginia Milk Producers' Assn.*, Civil Action No. 4482–56, unreported ruling of Judge Holtzoff (D. D. C. February 3, 1958); *United States* v. *Standard Oil of California*, Civil Action No. 11584–C, unreported ruling of Judge Carter sustaining Government's claim of privilege and reversing prior ruling (R. 502–505) permitting disclosure as to witnesses who consented (S. D. Cal., March 30, 1956) (R. 356–359); *United States* v. *Darling*, Civil Action No. 52–C–1716, unreported decision of Judge Perry (N. D. Ill.

Government to disclose grand jury transcripts in a civil case, without a clear showing of compelling need therefor, would "subvert the functions of federal grand juries" just as much as the attempt to examine into the workings of a grand jury which this Court rejected in *United States* v. *Johnson,* 319 U. S. 503, 513, as an unwarranted "intrusion * * * into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty * * *." In that case, the Court explicitly warned against devices which some of the states "have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes" (p. 513).

Even in a criminal case, a defendant cannot obtain the transcript of his own grand jury testimony as of right (*Goodman* v. *United States, supra,* p. 519), but only upon a clear showing that "strict application" of the traditional secrecy rule "would defeat the ends of

---

Nov. 18, 1955); *United States* v. *Morgan*, Civil Action No. 43–757, unreported ruling of Judge Medina (S. D. N. Y. Dec. 8, 1948) (R. 351–354).

In *United States* v. *General Motors Corp.*, 15 F. R. D. 486 (D. Del.), a civil action under the Elkins Act, the court similarly refused discovery of a grand jury transcript involving an investigation of the same conduct.

The only other civil case brought by the Government which we have found where the court directed discovery of a grand jury transcript is *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D. N. J.). There, however, the court directed production of the transcript of the testimony of only those witnesses who were to take the stand at trial and for the stated purpose of aiding the defense in examining them there. The question of possible production of the grand jury transcript for use by appellees in impeaching witnesses at the trial (cf. *Jencks* v. *United States*, 353 U. S. 657) obviously is not now before the Court.

justice." *United States* v. *Rose*, 215 F. 2d 617, 628–29 (C. A. 3); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. A *fortiori*, disclosure of grand jury testimony may be ordered in a civil case only upon the most compelling showing of necessity. As we shall now show, appellees have utterly failed to make such a showing.

C. In support of their motions for production of the grand jury transcript, appellees alleged: (1) that the Government was using the transcript (Procter, R. 119; Association, R. 129); (2) that the "information" contained therein was "necessary * * * for an adequate preparation of its defenses to this action, and is relevant to the matters alleged in the complaint," and that "[m]atters pertinent" to the defense "will never become known * * * unless access to the Grand Jury transcripts is granted" (Procter, R. 119–120; see the Association's substantially identical statement, R. 130); (3) that "[n]o need exists for preserving the secrecy" of the transcripts (Procter, R. 119), and that "no privilege of secrecy attaches to the testimony of a witness before the grand jury" (Lever, R. 135); (4) that Lever "is urgently in need of access to such testimony in order to discover * * * the evidentiary basis, if any, for the charges in the complaint and to prepare its defense to such charges" (Lever, R. 135); and (5) that "no practicable alternative to such discovery exists * * * because to attempt to obtain such discovery through depositions of such witnesses would necessarily involve substantial cost and severe inconvenience to all parties, would gravely retard the ex-

peditious preparation of this cause for trial, and would not in any event produce accurate information because of the lapse of time and other factors" (Lever, R. 135). Procter conceded (R. 119) that it had known "for many months" the names of "most if not all" of the witnesses who appeared before the grand jury; the Association stated (R. 130) that it "believes that the names of most, if not all," of such witnesses "have been known for some time."

These allegations fell far short of constituting "adequate reasons to justify production" (*Hickman* v. *Taylor, supra,* p. 512) of material which traditionally has been carefully safeguarded against disclosure. Appellees did not establish that "production of * * * facts" which "remain hidden in" the grand jury transcript "is essential to the preparation of [their] case" (*id.,* p. 511), or that "denial of such production would unduly prejudice the preparation of" their "case or cause * * * [them] any hardship or injustice" (*id.,* p. 509).

1. The mere conclusory allegations that the "information" contained in the transcript is "necessary" to the preparation of the case, and that "[m]atters pertinent" to the defense "will never become known * * * unless access to the Grand Jury transcripts is granted," do not establish "good cause." Since such stereotyped "showings" always could be made, the effect of treating them as sufficient to justify production would be to read the "good cause" requirement out of Rule 34. As the court stated in *Martin* v. *Capital Transit Co.,* 170 F. 2d 811, 812, 814 (C. A. D. C.), in upholding denial of a motion for produc-

tion under Rule 34 for failure to meet the standard of *Hickman* v. *Taylor*,

> Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party "*showing* good cause," not upon a mere allegation or recitation that good cause exists. * * * It was the duty of the appellant explicitly to show in his motion or by a supporting affidavit the need of the report for the purposes of the trial.

2. The claim that "no practicable alternative to such discovery exists" is not borne out by the record. The purpose of the discovery provisions of the Federal Rules of Civil Procedure is to enable the "parties to obtain the fullest possible knowledge of the issues and *facts* before trial" (*Hickman* v. *Taylor*, p. 501, emphasis added). Appellees could have obtained all pertinent *facts* without recourse to the grand jury transcript.

The Government had furnished them with lengthy and detailed statements of the facts upon which it was relying, and had disclosed to them a substantial portion of its documentary evidence (see Statement, *supra*, pp. 7–8). Appellees conceded (R. 119, 130, 339, see 471) that they knew the identity of "most, if not all" of the witnesses who had appeared before the grand jury, and the Government had offered to disclose the names of all grand jury witnesses (R. 294). A majority of the witnesses were or had been officers or employees of appellees (R. 471). There was no showing that those witnesses were unavailable, or that appellees could not interview them or take their

depositions, or that they had not done so.[22] Indeed Lever admitted that "there is nothing to prevent the defendants from taking the depositions of all persons having knowledge of the case, including all witnesses who testified before the grand jury" (R. 464–465); Colgate conceded that "[w]e could take the depositions of the witnesses whose names we know" and that by "questioning each of them about each of the very broad issues of the complaint we could cover most or all of the subjects that could have been raised before the grand jury" (R. 478); and the Association stated (R. 162) that it could "take their depositions, if we knew who they were." There was thus no claim, let alone a showing, that the grand jury "witnesses are no longer available or can be reached only with difficulty." *Hickman* v. *Taylor, supra,* p. 511.[23]

In sum, the situation here is comparable to *Hickman* v. *Taylor, supra,* p. 509, where, "[f]or aught that appears, the essence of what petitioner seeks either has been revealed to him already through the

---

[22] One of the witnesses had died subsequent to the grand jury proceedings (R. 472, 535), but that was not the basis of appellees' demand for the transcript of his testimony. There was no showing that appellees had not already interviewed him, or that the facts with respect to which he had testified were not otherwise available or even that he had any information relevant to the issues in this case.

[23] Although Lever alleged (R. 135) that taking depositions would entail substantial cost and severe inconvenience, and would not produce "accurate information because of the lapse of time and other factors," it set forth no facts to substantiate the contention. The mere inconvenience and expense of conducting deposition proceedings is not sufficient to establish good cause for breaching grand jury secrecy.

interrogatories [extensive pretrial disclosures by the Government] or is readily available to him direct from the witnesses for the asking." See, also, *United States* v. *General Motors Corp.*, 15 F. R. D. 486, 488 (D. Del.).

Indeed, it would appear that what appellees were seeking through discovery of the grand jury transcript was not to ascertain the *facts* upon which the Government's case was based (since they either already had such facts, or could readily obtain them), but to ascertain exactly how prospective witnesses had cast their testimony. This purpose is reflected by the circumstances under which the motions for discovery were first pressed. Initially, only Procter filed such a motion, and it did not notice it for hearing. Procter did nothing further about the motion for a year, until the Government had sought to take the deposition of one of its officials who had been a grand jury witness. He refused to answer any questions with respect to matters about which he had testified before the grand jury "until such time as relevant portions of the grand jury transcript are available" (see Statement, *supra*, p. 9). Shortly thereafter, Procter moved for a hearing on its discovery motion, and the other appellees filed similar motions. It would appear, therefore, that Procter pressed its discovery application not because it had been unable to ascertain the facts upon which the Government's case was based, but "to know what our man said at that time * * * [and] to give us some advance warning of any material change in his state-

ment * * *." *Safeway Stores* v. *Reynolds,* 176 F. 2d 476, 478 (C. A. D. C.).

To permit discovery for such purpose would subvert the salutary policy of the Federal deposition-discovery rules to increase the "[m]utual knowledge of all the relevant facts gathered by both parties [which] is essential to proper litigation." *Hickman* v. *Taylor,* p. 507. It could lead to the abuses foreseen in *Margeson* v. *Boston & Maine Railroad,* 16 F. R. D. 200, 201 (D. Mass.):

> If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in "knowing the truth before trial" is prompted by a desire to find the most plausible way to defeat the truth. For this, and for other reasons, I believe the requirement of good cause for compulsory pretrial production should mean more than mere relevancy and competency, or ordinary desirability from the standpoint of the movant, and should be something in the nature of special circumstances. * * *

The fact that the Government was using the transcript in preparing the civil suit for trial does not mean that a lesser showing will suffice to establish good cause. For in virtually every case the material sought to be discovered is being used by the adverse party. That was certainly true in *Hickman* v. *Taylor.* Yet there the Court indicated that discovery of traditionally protected material would be granted only upon a showing of extraordinary need.

There can be no doubt as to the propriety of the Government's using the grand jury transcript in preparing the civil antitrust case. Conduct violating Sections 1 and 2 of the Sherman Act may give rise to criminal or civil proceedings, or both. The Attorney General therefore has the duty to institute criminal proceedings when appropriate, and also to "institute proceedings in equity to prevent and restrain such violations" (Section 4). While the Government does not institute grand jury proceedings unless it has reasonable grounds for anticipating an indictment, it cannot always be foretold whether the evidence ultimately produced will justify a criminal case or be merely sufficient to support civil proceedings. Moreover, in particular cases it may be difficult to determine, before all the evidence is weighed, whether criminal, or civil, or both proceedings are best fitted to dissipate past, and deter future, transgressions. Where, as in the instant case, no indictment is returned, the consequence plainly cannot be to preclude the Attorney General from pursuing the alternative civil remedies provided by the statute. And in pursuing such civil remedies, the Attorney General should not be deprived of the right to use evidence properly and lawfully secured, in carrying out his statutory "duty" to conduct "proceedings in equity to prevent and restrain" Sherman Act violations.[24]

[24] There is no substance to the charges that the grand jury was "use[d] to prepare and try a civil action", (Colgate Motion to Dismiss or Affirm, p. 29), and that the "grand jury investigation which preceded the filing of the civil complaint * * * was a device employed by the United States to gather infor-

The contention that it would be improper for the Government to use evidence obtained through grand jury proceedings in a subsequent civil antitrust suit recently was rejected in *In re Petroleum Industry Investigation*, 152 F. Supp. 646 (E. D. Va.). In denying a motion to limit the Government's use of documents to be produced pursuant to grand jury subpoenas to the pending criminal proceedings, the court there stated (p. 647):

> A civil suit predicated on antitrust or similar legislation, when brought by the Government, is in fact and in law a prosecution. Its aim is not compensation but correction. The obligation of the Justice Department to invoke civil remedies in an appropriate situation is just as bounden as its duty to institute requisite criminal proceedings. Consequently, if books and papers coming to the knowledge of the Government's attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is certainly proper, indeed incumbent upon them to use for that purpose the information in their hands. This is nonethe-

---

mation and for purposes of discovery" (Lever Motion to Dismiss or Affirm, p. 25). The district court correctly rejected a similar charge when Procter sought to suppress certain documents which the Government had obtained from it through grand jury subpoenas, on the ground that the Government "used the criminal investigation as a pretense for obtaining documents upon which to base a civil case" (R. 75). In denying the motion, the district court ruled that "[t]he assertion has not been substantiated" (*ibid.*). The charge by Lever and Colgate is likewise unsubstantiated, and has no basis in the record.

> less true though no process available in a civil action has the competency to discover this data beforehand.

These considerations are equally applicable to use of the grand jury transcript. See, also, an earlier opinion of the court below in the instant case, *United States* v. *Procter & Gamble Co.*, 14 F. R. D. 230, 233; R. 221–224.

The short of the matter is that appellees have not shown that their case is the "rare situation justifying production" (*Hickman* v. *Taylor, supra,* p. 513), in advance of the trial, of traditionally secret grand jury transcripts. If the kind of showing which appellees here made—that "the transcripts would be useful" to them "during their preparation for trial" (R. 213)—establishes good cause for blanket production of grand jury transcripts in a civil antitrust case, it would be the rare antitrust case in which the defendants could not obtain the entire transcript. As we have noted (see *supra,* n. 21, p. 42), however, the consistent course of judicial decision has been to deny such discovery. The standard of "good cause" applied by the district court in this case would permit such easy and unlimited access to grand jury transcripts as seriously to interfere with the effective functioning of the grand jury as a law enforcement institution. Whether, and to what extent, developments at the trial would warrant disclosure of pertinent portions of the transcript, *e. g.*, for use in cross-examination of Government witnesses who also appeared before the grand jury, presents questions not now before this Court. We rec-

ognize that a materially different situation might be presented *at the trial* if disclosure should be sought on the basis of the specific, concrete matters developed at the trial. In the latter situation the district court could exercise a "sound discretion", giving weight to the needs of the defense as well as the public interest in preserving the secrecy of grand jury proceedings, in determining whether particular portions of the transcript should be made available under "some appropriate procedure * * * adopted to prevent its improper use". *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 233.

CONCLUSION

The judgments of the district court dismissing the complaint for failure to produce the grand jury transcript should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
W. LOUISE FLORENCOURT,
Attorneys.

MARCH 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958

LIBRARY
SUPREME COURT, U.S.

RECEIVED
JAN 2 1957
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 51

Office - Supreme Court, U.S.
FILED
JAN 2 1957
JOHN T. FEY, Clerk

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE COLGATE-PALMOLIVE COMPANY.

MATHIAS F. CORREA,
Cahill, Gordon, Reindel & Ohl,
63 Wall Street,
New York 5, New York,
Attorney for Appellee Colgate-Palmolive Company.

Of Counsel:
JERROLD G. VAN CISE,
JAMES B. HENRY, JR.,
New York, New York.

January 2, 1957.

Pandick Press, Inc., 22 Thames St. New York 6, N. Y., U. S. A.

INDEX.

	PAGE
MOTION TO DISMISS OR AFFIRM	1
QUESTION PRESENTED	2
COUNTER-STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	8
POINT I.—The judgments of dismissal appealed from are consent judgments invited by the appellant	9
POINT II.—A consent judgment is affirmed on appeal without consideration of the merits	13
A. Consent judgments in general	13
B. Acceptance of benefits	17
C. Voluntary dismissals	19
POINT III.—To permit appeal of consent dismissals would necessarily permit plaintiffs to obtain appeal of interlocutory orders	21
POINT IV.—The orders to produce transcripts of grand jury testimony were a proper exercise of discretion by the court below	25
CONCLUSION	33

CITATIONS.

Cases:

	PAGE
Ballot v. *United States*, 171 Fed. 404 (1st Cir 1909)	14
Carlson v. *United States*, 209 F. 2d 209 (1st Cir. 1954)	28
Central Transportation Co. v. *Pullman's Palace Car Co.*, 139 U. S. 24	20
Costello v. *United States*, 350 U. S. 359	32
Cybur Lumber Co. v. *Erkhart*, 247 Fed. 284 (5th Cir. 1918)	21
Doggett v. *Hunt*, 199 F. 2d 152 (5th Cir. 1952)	21
Evans v. *Phillips*, 4 Wheat. 73	20
Fernandez v. *Carrasquillo*, 146 F. 2d 204 (1st Cir. 1944)	20
Francisco v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir. 1906)	19, 21, 23
Hale v. *Henkel*, 201 U. S. 43	29
Hickman v. *Taylor*, 329 U. S. 495	25, 26
Hoffman v. *United States*, 341 U. S. 479	29
International Carrier-Call & Television Corp. v. *Radio Corporation of America*, 142 F. 2d 493 (2d Cir. 1944)	16, 20
Kelly v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936)	21, 23
Law v. *United States*, 266 U. S. 494	19
Marks v. *Leo Feist, Inc.*, 8 F. 2d 460 (2d Cir. 1925)	20
Pacific Railroad v. *Ketchum*, 101 U. S. 289	16
Parr v. *United States*, 351 U. S. 513	16
Rudolph v. *Sensener*, 39 App. D. C. 385 (D. C. Cir. 1912)	20
Securities and Exchange Commission v. *Jones*, 85 F. 2d 17 (2d Cir. 1936), *cert. denied*, 299 U. S. 581	16
Stewart v. *Lincoln-Douglas Hotel Corp.*, 208 F. 2d 379 (7th Cir. 1953)	21
Swift & Co. v. *United States*, 276 U. S. 311	15

PAGE

The Schools v. *Risley*, 10 Wall. 91 19
Thomsen v. *Cayser*, 243 U. S. 66 15
United States v. *All American Airways, Inc.*, 180 F. 2d 592 (9th Cir. 1950) 16
United States v. *Babbitt*, 104 U. S. 767 14
United States v. *Benedict*, 261 U. S. 294 18
United States v. *Evans*, 5 Cranch 279 20
United States v. *Johnson*, 319 U. S. 503 32
United States v. *Reynolds*, 345 U. S. 1 29
United States v. *Rose*, 215 F. 2d 617 (3d Cir. 1954) 31
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 30
United States v. *Star Const. Co.*, 186 F. 2d 666 (10th Cir. 1951) 16
United States v. *Wallace & Tiernan Co.*, 336 U. S. 793 ..... 13, 20, 22
Vaughan v. *City Bank & Trust Company*, 218 F. 2d 802 (5th Cir. 1955), *cert. denied*, 350 U. S. 832 21
Water-works Company v. *Barret*, 103 U. S. 516 16
White & Yarborough v. *Dailey*, 228 F. 2d 836 (5th Cir. 1955) 18, 21
F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U. S. 228 19

Statute:

Expediting Act of February 11, 1903, 32 Stat. 823, as amended; 15 U. S. C. §29 (1952) 22

Miscellaneous:

13 *Cyclopedia of Federal Procedure* §57.58 (3d ed. 1952) 16
Federal Rules of Criminal Procedure
6(e) 9, 25
Federal Rules of Civil Procedure
30(b) 25
34 9
37(b) 5
8 Wigmore, *Evidence* §2362 (3d ed. 1940) 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 609.

UNITED STATES OF AMERICA,

Appellant,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE COLGATE-PALMOLIVE COMPANY.

The appellee Colgate-Palmolive Company, a defendant below, pursuant to Rule 16 of this Court respectfully moves to dismiss the instant appeal, on the ground that it is not within the jurisdiction of this Court because not taken in conformity with statute, or in the alternative to affirm the judgments below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Question Presented.

The appellant's statement of the question presented by this appeal is phrased in such a way as to obscure the issue before this Court. The jurisdictional statement at page 3 and the notice of appeal both state under this heading:

> "During pretrial proceedings, the district court directed the United States, over its objection and on pain of dismissal of the suit, to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who had appeared before the grand jury. When the United States refused to permit such inspection, the court dismissed the suit. The question presented is whether the district court erred in directing the Government to make such disclosure of the grand jury transcript."

In fact, however, the district court did not make any direction over the Government's objection and "on pain of dismissal of the suit." On July 24, 1956 the court entered production orders relating to grand jury testimony over the Government's objection. But these orders were not "on pain of dismissal of the suit." They specified no sanction if they were disobeyed, and at the time of their entry neither the court nor any party had suggested dismissal. The appellant itself, to be relieved of the directive contained in the court's orders, and to limit the possible consequences of its refusal to produce, proposed the substitution of an amended order providing that unless production was made the suit would be dismissed. This was the only order that could be said to be "on pain of dismissal of the suit." Since this order was proposed by the Government, however, it can hardly be said to have been entered over the Government's objection.

It is thus apparent that the question presented is not accurate as the appellant puts it. Whether "the district court erred in directing the Government to make such disclosure" is moot and cannot be brought up by the judgments appealed from. The only orders directing disclosure were superseded on the appellant's motion. All that can remain alive is the question of whether the district court erred in entering an order, on the appellant's motion, providing that the action would be dismissed unless the Government produced the transcript. As so stated the question reveals on its face the weakness of the appellant's position. This doubtless explains why the appellant chose to present the issue as though the appeal had been taken from the superseded orders and to omit from its statement of the question presented all reference to its own invitation of dismissal.

Counter-Statement of Facts.

The history of the present litigation is set out in some detail in two opinions of the court below which are reported at 19 F. R. D. 122 and 19 F. R. D. 247, and which are appended to appellant's jurisdictional statement. The following facts are significant for present purposes.

A grand jury sitting in the District of New Jersey from May 1951 until November 25, 1952 investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. Firms under investigation included the present defendants. No indictment was returned. On December 11, 1952 the complaint in the present civil action was filed.

A complex pretrial discovery procedure ensued. In the course of this procedure each of the defendants moved for an order permitting such defendant to inspect and copy the transcripts of testimony of witnesses before the grand jury.

The motions are set out at pages 1-10 of the appellees' joint appendix, which is bound separately.

These motions were argued extensively on December 12, 1955. On April 17, 1956 the first opinion cited above was handed down by Judge Modarelli, granting the motions for inspection in full.

The plaintiff then filed a motion for reconsideration attaching a formal "claim of privilege" with respect to the transcripts, signed by the Attorney General. This motion was argued at length on June 11, 1956; and on July 9, 1956 the second opinion cited above denied the motion. The court summarized the reasons for the earlier decision as follows:

> "I concluded that since the plaintiff is using the transcripts containing relevant information, and since equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial, and since none of the reasons for the rule of secrecy applies, the ends of justice required me to grant the motions." (Jurisdictional statement, pp. 49-50).

At a hearing on July 23, 1956, the defendants submitted orders for production in a form which had been consented to by the plaintiff. The full transcript of that hearing appears at pages 11-15 of the joint appendix. The following colloquy is of particular significance:

> "Mr. McDowell: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered.
>
> "The Court: You heard what Mr. McDowell said?
>
> "Mr. Correa: Yes; if your Honor please, I heard what Mr. McDowell has said. Now, the order in the

> form submitted to your Honor provides that the Government shall make production within thirty days from the entry of the order. I take it that that means, as a practical matter, that we shall have to wait till the expiration of that time to find out whether the Government adheres to the position which has been enunciated here this morning or not. If they do adhere to that position then, I take it, we shall have to take such further steps under the rules as we may be advised." (Joint appendix, pp. 13-14).

Under Rule 37(b) of the Federal Rules of Civil Procedure these steps might have included a motion to place the plaintiff's representatives in contempt of court, a motion to preclude the Government from offering proof with respect to any matter covered in the grand jury minutes, or a motion to stay the proceeding, as well as a motion to dismiss. No indication was made, however, as to which if any of these remedies might be asked or granted. Nowhere in this hearing, nor in any other manner to the date of this hearing, had either the court below or any defendant suggested that the action might be dismissed if the plaintiff refused ultimately to produce the transcripts.

The court signed the orders on July 23, 1956 as submitted, and they were entered the following day. They appear at pages 16-23 of the joint appendix. These orders denied the plaintiff's motion, granted the defendants' motions and ordered production for inspection and copying of the transcripts of the testimony of all witnesses before the grand jury within thirty days of entry.

On August 16, 1956, prior to the expiration of thirty days, the plaintiff filed a "motion to amend or, alternatively, to stay order of July 24, 1956" attaching a proposed form of order, an affidavit of Herbert Brownell, Jr. and a brief. These papers appear at pages 24-31 of the joint appendix.

The motion was for "the Court to enter an amended order, in the form attached hereto, in substitution for the orders" previously entered. Alternatively, stay of the previous orders pending appeals and/or application for an extraordinary writ was asked.

The basis for the motion is given in the brief as follows:

> "We believe that it would be unseemly for the Attorney General, as the chief law enforcement officer of the United States, to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order in order to obtain effective appellate review thereof. Under these circumstances, we urge the Court to enter an amended order which provides that if the transcripts are not made available by August 24 (the date previously fixed by the Court), an order will be entered dismissing the complaint. Such an amendment of the order of July 24 would in no way prejudice the defendants, and it would avoid placing the Attorney General of the United States in the dilemma above noted. * * *" (Joint appendix, p. 30.)

An intention to appeal this amended order is then stated. In motion, affidavit and brief the alternative of staying rather than amending the orders of July 24, 1956 is clearly recited as the plaintiff's second choice if the court will not dismiss.

A hearing of this motion was had on August 21, 1956. The transcript of this hearing is set out at pages 33-39 of the joint appendix. The following statement is of particular interest:

> "Mr. Friedman: May it please your Honor, the order which your Honor entered in this matter on the 24th of July directed the United States to make

available to the defendants within thirty days the grand jury transcripts. This order by its terms places the Attorney General in a very difficult dilemma, because he has a number of alternatives and we think that each of these alternatives would involve a serious violation of an important public interest which the Attorney General thinks he should carry out. And we are therefore coming before your Honor to suggest that the order be amended in a way to eliminate these possibilities. And, alternatively, if your Honor does not see fit to amend the order we are asking for a stay of the order pending the taking of necessary appellate review in the Supreme Court.

"The amendment which we are proposing to your Honor is that instead of the order directing us within thirty days to make the grand jury transcripts available that the order recite that in the event the United States does not make the grand jury transcripts available within thirty days the Court will then enter an order of dismissal" (Joint appendix, pp. 34-35).

Each of the defendants in effect took the position that it did not see how it could oppose entry of the proposed amended order.

Accordingly the order submitted by the plaintiff as part of its motion papers was signed by the court precisely as submitted, except that at the suggestion of one of the defendants and with the consent of the plaintiff the word "Amended" was added in ink to the word "Order" in the caption (Joint appendix, p. 38). The amended order required production by August 24, 1956, this being the date upon which the time for production under the original order would have expired.

Under date of September 6, 1956 the court addressed a letter to all counsel, inquiring whether the transcripts had been produced and concluding:

> "If the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order."

A copy of this letter appears at pages 40-41 of the joint appendix.

All defendants replied under date of September 7, 1956 that no production had been made and each attached a proposed form of judgment dismissing the action. Copies of these letters and forms of judgment were sent to the plaintiff. The plaintiff also replied to the court under date of September 7, 1956. A copy of this reply is set out at page 42 of the joint appendix. The entire body of this letter was as follows:

> "I have Your Honor's letter addressed on September 6, 1956 to counsel in the above-entitled cause. In response to your inquiry I must respectfully state that plaintiff has not produced the grand jury transcripts for inspection by the defendants."

On September 13, 1956 the court signed the judgment submitted by each defendant, and all four judgments were then filed. They appear at pages 56-59 of the jurisdictional statement.

Summary of Argument.

1. The judgments appealed from are consent judgments, entered on the invitation of the appellant for its benefit. Having achieved the benefits of being relieved of an obligation to produce the grand jury testimony and of limiting the consequences of refusal to produce to dismissal of the action, the appellant cannot now complain of the dismissal.

2. Under the applicable decisions of this Court and other courts, consent judgments are affirmed without consideration of the merits of any claim of error, inasmuch as any error is waived by the consent.

3. To grant review of invited dismissals would necessarily be to authorize a procedure for appeal of interlocutory orders in circumvention of the statutes limiting appeals to final judgments.

4. The orders for production of the grand jury testimony were a proper exercise of discretion by the district court under Rule 6(e) of the Federal Rules of Criminal Procedure and Rule 34 of the Federal Rules of Civil Procedure. The grand jury testimony was used by the appellant in the preparation and prosecution of the present civil action. The liberal civil discovery rules, especially vital to the expeditious administration of major antitrust litigation, require disclosure of the testimony unless a countervailing policy prevents. In the present situation, the grand jury having been discharged several years, the traditional reasons for secrecy are inapplicable.

POINT I.

The judgments of dismissal appealed from are consent judgments invited by the appellant.

From the foregoing statement of facts in the record certain conclusions are apparent as to the nature of the judgments appealed from and of the prior orders.

1. **The appellant proposed the substitution of the amended order for the original orders for the purpose of**

achieving certain results which it desired. The appellant's avowed object in proposing the amended order was to avoid the "unseemly" aspects of being "required to disobey" an order of the court. The amended order relieved the Attorney General of the court's command to make production.

The amended order also gave the Government an election of the remedies available against it as a result of its failure to make production. Appellant's counsel noted that the Attorney General had "a number of alternatives" and requested that "the order be amended in a way to eliminate these possibilities" (Joint appendix, pages 34-35).

Normally one who chooses to disobey a court's discovery order has no say as to the consequences. It is for the court and the other parties to determine what should be done. The offending party may, for example, find himself subject to a contempt order. If as was represented to the district court the appellant considered it "unseemly" for the Attorney General to be "required to disobey" a court order, it would probably have considered it even more unseemly for one of the Attorney General's subordinates to be held in contempt of court as a consequence of such disobedience.

It goes without saying that the Government was not entitled as a matter of right to relief from the "unseemly" aspects of being "required to disobey" a court order. The Government, like any private litigant, must take this factor into consideration in deciding whether it is really "required" to disobey an order of court. The Government is entitled to no special advantage in the courts.

It is therefore apparent that by securing the amended order the appellant obtained what from its point of view were significant advantages—advantages in exchange for which it freely tendered the dismissal from which it now appeals.

2. **The original orders directing production of grand jury testimony were superseded.** The appellant's motion was for "an amended order, in the form attached hereto, in substitution for the orders entered in the above-entitled action on July 24, 1956 . . .". When this amended order was entered, the provisions of the earlier orders directing production were in effect expunged. It was as if they had gone out of existence. By proposing the substitution the appellant mooted the issue of whether the original orders were properly entered. The propriety of these orders became as moot as the constitutionality of a statute which has been repealed retroactively to the date of its enactment. The only issue remaining in the case became whether the amended order—proposed by the appellant—was properly entered. That is the sole issue on this appeal from the judgments entered upon that order.

3. **The judgments were entered at the invitation of the appellant.** This invitation was made in three steps. First, the appellant proposed to the court the amended order containing the language that "unless the plaintiff on or before August 24, 1956 produces" the grand jury minutes, "the Court will enter an order dismissing the complaint herein." Second, the appellant failed to produce the minutes within the designated time. Third, although the court advised counsel for the appellant that it proposed to "enter an order dismissing the complaint as provided in the amended order," the appellant did not take any steps to oppose entry of the judgments of dismissal, either as to form or as to substance. Accordingly, the appellant must be taken not only to have consented to these judgments, but actually to have invited their entry.

4. The appellant was not subjected to an involuntary dismissal; it made a deliberate choice among a number of alternatives open to it.

a. Appellant recognized that it had "a number of alternatives". Thus it might have sought a stay of the original production orders pending appeal and/or application to this Court for an extraordinary writ. This relief was in fact proposed as a second choice in the moving papers below. Presumably the appellant had a reason for not preferring this most straightforward attempt at review. Undoubtedly counsel for the appellant anticipated objection to invoking the jurisdiction of this Court at what was obviously a preliminary stage of an extended proceeding. By arranging for the dismissal of the complaint, they may have hoped to prevent the Court from considering such an objection. Since the Government is always free to file a new complaint, based on the circumstances then alleged to exist, dismissal of a former complaint was likely to entail little serious hardship to the Government. This is particularly true where the action has been pending for four years. Thus a dismissal may have been considered the most hopeful device for perfecting an appeal from a preliminary ruling.

b. The appellant might have waited for a final judgment to be imposed. It could simply have gone forward with its case. This would have provoked the question of what should be done about its failure to comply with the court's orders. Had the remedy decided upon been an order citing counsel for contempt of court, review of the propriety of the production orders might have been attempted on appeal from the contempt orders. Had the remedy decided upon been an order precluding the offering of evidence as to certain areas of proof, the appellant

might have tried to establish its case as best it could under this handicap, and if it failed, appealed from the consequent dismissal. This would have been similar to what was done in *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793. Other remedies might have been invoked, as to the propriety of which the appellant would have been heard; but the choice would have been the court's.

c. Instead the appellant chose to take matters in its own hands and invite, in effect, the entry of an immediate dismissal. This secured judgments which were technically "final" without subjecting the appellant to the possible expenses, delays and embarrassment of normal litigation. By demanding and receiving these concessions, however, the appellant defeated its purpose. It cannot have its own way in the trial court and at the same time play the part of an aggrieved party in an appellate court. No matter how much it objects to production of the grand jury minutes, it cannot escape the fact that the order directing dismissal of the case if the minutes were not produced, and the judgments following from that order, were its own idea.

POINT II.

A consent judgment is affirmed on appeal without consideration of the merits.

A. Consent judgments in general.

A consent judgment is no less a consent judgment because one of the consenting parties is dissatisfied with some aspects of it. It is safe to say that most antitrust consent decrees are considered objectionable by one of the consenting parties. The decrees are often agreed to not

because they are satisfactory to the defendant, but rathe
because they are considered preferable to what migh
otherwise follow. The Government's situation here is a
analogous one. It chose what it regarded as the leas
of various evils.

Nevertheless it is settled law that the right of appea
in the federal courts is not open to one who has made such
a choice. That right is reserved for those who have used
their every resource to prevent the entry of judgment
against them. Any contrary doctrine would lead to abuse
of appellate jurisdiction, as is more fully developed in
Point III.

Viewed in this light it becomes obvious that one who
has consented to judgment against himself for the avowed
purpose of presenting his case to an appellate court not
only does not thereby become entitled to appeal, but in fact
loses any opportunity to appeal he might otherwise have
had.

This precise situation was considered in *United States*
v. *Babbitt*, 104 U. S. 767. The plaintiff below lost an action
in the Court of Claims to have service as a cadet included
in his army longevity pay, but the Attorney General con-
sented to a *pro forma* judgment in favor of the plaintiff
so that the question could be appealed. This Court affirmed
the judgment without considering the merits, holding:

> "The consent to the judgment below was in law a
> waiver of the error now complained of" (104 U. S.
> 768).

See also *Ballot* v. *United States*, 171 Fed. 404 (1st Cir.
1909).

The *Babbitt* decision follows the universal rule in the
courts of the United States from the earliest times, that

a final judgment entered by consent will not be reviewed.* The usual formulation is that the appellate court has jurisdiction of the appeal, but the judgment will be affirmed without consideration of the merits. In a few cases the appeal has been dismissed. This Court's most recent detailed statement of the rule appears in *Swift & Co.* v. *United States*, 276 U. S. 311, 323-4, an opinion by Mr. Justice Brandeis:

> "The decree sought to be vacated was entered with the defendants' consent. Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. *Webb* v. *Webb*, 3 Swanst. 658; *Bradish* v. *Gee*, 1 Amb. 229; Daniell, Chancery Practice, 6th Am. ed., 973-974. In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289, 295; *White* v. *Joyce*, 158 U. S. 128, 147; or of fraud in its procurement, *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451; or that there was lack of federal jurisdiction because of the citizenship of the parties. *Pacific R. R. Co.* v. *Ketchum, supra.* Compare *Fraenkl* v. *Cerecedo*, 216 U. S. 295. But 'a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266. Compare *United States* v. *Babbitt*, 104 U. S. 767; *McGowan* v. *Parish*, 237 U. S. 285, 295. . . ."

---

* As this Court states in *Thomsen* v. *Cayser*, 243 U. S. 66, it is not an appeal from a consent judgment for a plaintiff who is successful in the trial court, but whose case is remanded for a new trial by an appellate court, to waive the right to a new trial and take judgment absolute for the purpose of appeal to this Court.

The basis for the rule is usually expressed in terms of waiver. This was the rationale of the leading case of *Pacific Railroad* v. *Ketchum*, 101 U. S. 289. To the same effect is *Securities and Exchange Commission* v. *Jones*, 85 F. 2d 17 (2d Cir. 1936), *cert. denied*, 299 U. S. 581.

It would seem also that a party cannot be aggrieved by a judgment to which he has consented. Thus in *United States* v. *Star Const. Co.*, 186 F. 2d 666, 669 (10th Cir. 1951), in affirming a judgment, the court said of a tax credit included in the judgment to which the United States Attorney had agreed:

> "A party is not aggrieved by a ruling regularly made, with his express or implied consent."

This formulation has been adopted in 13 *Cyclopedia of Federal Procedure* §57.58 (3d ed. 1952), which states:

> "A consent judgment or decree, or one brought about by consent is not appealable. The reason is that a consenting party is not aggrieved by it and by consenting the plaintiff has estopped himself to complain of the judgment."

One who is not aggrieved by a judgment may not appeal it, *Parr* v. *United States*, 351 U. S. 513.

Frequently courts dispose of appeals from consent judgments or orders in summary fashion, by affirming the lower court's ruling without discussion. See, for example, *Waterworks Company* v. *Barret*, 103 U. S. 516, and *United States* v. *All American Airways, Inc.*, 180 F. 2d 592 (9th Cir. 1950). This is presumably done because the rule concerning such orders is so well established and so obviously desirable. Thus in *International Carrier-Call & Television Corp.* v. *Radio Corporation of America*, 142 F. 2d 493, 494 (2d Cir. 1944), Judge Swan said for the court:

> "Counsel then consented to a dismissal with prejudice, and the court so ordered . . . Having consented to a final dismissal of the unfair competition count, it is utterly fatuous to suppose that this part of the judgment can be reversed on appeal." Pacific R. R. *v.* Ketchum, 101 U. S. 289, 295, 25 L. Ed. 932; Marks *v.* Leo Feist, Inc., 2 Cir., 8 F. 2d 460, 462."

In the present case the appeal is from the judgments of dismissal, and the only question that can be presented is whether entry of those judgments of dismissal was error. The appellant having consented to the entry of those judgments, an unbroken chain of authority holds that any error was waived and the judgments must be affirmed.

B. Acceptance of benefits.

The avowed purpose of appellant's procedure was relief from the court's direction to produce the grand jury transcripts. By securing an amended order containing no express direction to produce, but rather giving the alternative of production or dismissal, the Government achieved its stated objective of avoiding the "unseemliness" of being "required to disobey" an order of court. It also limited the consequences of refusal to produce and assured itself that none of its representatives would be subjected to a contempt citation. The burden assumed in exchange for these concessions was to be production or dismissal, at the appellant's option. The appellant chose dismissal. Now, however, having secured the benefit of the concessions it seeks to undo the dismissal, which was the *quid pro quo* it had tendered.

Similar attempts to eat one's cake and have it too are often involved in appeals from consent judgments. One who appeals from such a judgment is frequently in the position of having accepted a benefit under the judgment; and

by his appeal he seeks either to secure a further benefit or to be relieved of the concomitant burden. This he will not be allowed to do.

United States v. *Benedict*, 261 U. S. 294, illustrates the principle. This was an action for recovery from the United States for certain lands taken along New York Bay. In the course of an appeal by the United States from the award given the former property owner, the Circuit Court of Appeals in an opinion upheld the award but said a new trial would be granted unless the plaintiff below assigned to the City of New York, a defendant, an amount proportional to the area of the platted streets. The plaintiff assigned this amount to the City, which accepted it, and the contested judgment was formally affirmed. The City by writ of error then sought an additional amount for portions of the streets between the high-water line and the pierhead line. This Court held in an opinion by Mr. Justice McReynolds:

> "We think it may not deny voluntary acceptance of the assignment and full assent to the arrangement which defendant in error carried out with the obvious purpose of ending the controversy between them. It cannot hold what it accepted and demand more. The final judgment must be treated as though entered upon its express consent; and its writ of error is accordingly dismissed" (261 U. S. 298).

The most recent case in the Courts of Appeals on appealability of consent judgments adopts a similar rationale, *White & Yarborough* v. *Dailey*, 228 F. 2d 836, 837 (5th Cir. 1955). There also the appellant had accepted payment under an agreed judgment and subsequently sought to appeal. In a *per curiam* opinion dismissing the appeal the court said:

> "It is not such a case, first, because the appeal sought to be taken is from an agreed judgment, the

benefits of which have been accepted. 'The reason for this rule is that a party cannot proceed to enforce and have the benefit of such portions of a judgment as are in his favor and appeal from those against him. In other words, the right to proceed on a judgment and enjoy its fruits and the right to appeal therefrom are totally inconsistent positions and the election to pursue one course must be deemed an abandonment of the other.' * * *"

C. Voluntary dismissals.

It not infrequently happens that before verdict a plaintiff decides, perhaps as a result of a ruling of the court, that it is either undesirable or impossible for him to proceed. He then requests that the action be dismissed. Such dismissals are often referred to as voluntary nonsuits. Sometimes he tries to appeal from this dismissal if it was inspired by an adverse ruling.

Such consent judgments of dismissal are treated precisely like other consent judgments. In the federal courts and the courts of most states they are affirmed without consideration of the merits of any objection to rulings behind the judgment, or the appeals are dismissed.

Where such voluntary dismissals are entered upon the invitation of the plaintiff alone, as in the present case, they fall more obviously within the rule that an appellant cannot complain of "invited error", whether the supposed error be in the admission of evidence, *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U. S. 228, 231; in failure to sit with a jury, *Law* v. *United States*, 266 U. S. 494, 495; in instructions to the jury, *The Schools* v. *Risley*, 10 Wall. 91, 114; or in granting a nonsuit. Thus it was said in *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354, 355 (8th Cir. 1906):

"But a judgment of nonsuit on the motion, at the request or with the consent of the plaintiff, is not

> reviewable by writ of error at his suit; because he is estopped from convicting the trial court of an error which he requested it to commit."

The leading decisions on voluntary nonsuits are *United States* v. *Evans*, 5 Cranch 279, and *Evans* v. *Phillips*, 4 Wheat. 73, a *per curiam* judgment dismissing the writ of error. In *United States* v. *Evans* it appears that at the trial certain testimony was rejected, and the attorney for the United States then became nonsuit. On a writ of error the decision is given as follows:

> "Marshall, Ch. J., delivered the opinion of the court, that in such a case, where there has been a nonsuit, and a motion to re-instate overruled, the court could not interfere.
>
> "Judgment affirmed."

The rule of these cases is repeated in *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 39, which seems to be the last time this Court has expressed a view on the matter. In *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794-5, fn. 1, this Court noted on a motion to dismiss the appeal that the record failed to sustain the appellees' contention that the Government invited dismissal of the action. The implication of the footnote appears to be that if the Government had invited dismissal the appeal would not have been heard.

The Courts of Appeals have frequently considered the appealability of voluntary dismissals and, so far as we can determine, each of the seven Circuits that has passed on the question since 1900 has decided that voluntary dismissals are not subject to review. *Rudolph* v. *Sensener*, 39 App. D. C. 385 (D. C. Cir. 1912); *Fernandez* v. *Carrasquillo*, 146 F. 2d 204 (1st Cir. 1944); *International Carrier-Call & Television Corp.* v. *Radio Corporation of America*, 142 F. 2d 493 (2d Cir. 1944); *Marks* v. *Leo Feist, Inc.*, 8 F.

2d 460 (2d Cir. 1925); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936); *Doggett* v. *Hunt*, 199 F. 2d 152 (5th Cir. 1952)*; *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284 (5th Cir. 1918); *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 208 F. 2d 379 (7th Cir. 1953); *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir. 1906).

In all of these decisions the action was simply dismissed, in some cases with prejudice and in others without. In none was the dismissal a part of a plan proposed by the plaintiff under which he would be relieved of an affirmative duty imposed by the court in exchange for the dismissal. The benefit, if any, achieved by the plaintiffs in these cases was thus considerably less tangible than in the present case. *A fortiori*, therefore, the judgments of dismissal here are not subject to review.

POINT III.

To permit appeal of consent dismissals would necessarily permit plaintiffs to obtain appeal of interlocutory orders.

To permit a plaintiff to tender a judgment of dismissal after an adverse interlocutory ruling and then appeal the ruling in the guise of appealing the final judgment would plainly be to permit appeal of the interlocutory ruling. Such appeals are in circumvention of the various federal

---

* The subsequent decision in *Vaughan* v. *City Bank & Trust Co.*, 218 F. 2d 802 (5th Cir. 1955), *cert. denied*, 350 U. S. 832, may appear inconsistent through its conversion on the basis of the record of a dismissal voluntary on its face to an involuntary dismissal for want of prosecution; the appeal was heard and the judgment affirmed on the merits. The plaintiff appeared without counsel, which may have influenced the court. The still more recent decision in *White & Yarborough* v. *Dailey*, discussed above, shows that this court still follows the general rule as to consent judgments.

statutes governing appeals, as, for example, that under which the present appeal purports to be brought, 15 U. S. C. §29, which permits appeal to this Court from "the final judgment of the district court".

The door would be thrown open equally to appeals from voluntary dismissals with and without prejudice, inasmuch as this Court has held that the fact that a dismissal is without prejudice does not make the cause unappealable, the suit being ended as far as the district court is concerned, *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793.

If voluntary dismissals are appealable, a plaintiff who receives an adverse interlocutory order would in many cases lose almost nothing by requesting a dismissal without prejudice. If it was granted, he could then appeal his interlocutory order as of right. If the interlocutory order was incorrect, he would secure a reversal and be where he was before. If it was correct, the dismissal would be affirmed but he could begin again. Thus he would have obtained in the fullest practical sense review of the interlocutory order at virtually no risk.

If he requested and received a dismissal with prejudice he could still obtain review of the interlocutory order, although with a somewhat greater risk. If the order was right, he would, of course, be concluded. If it was wrong, however, judgment would be reversed and the case continue. Thus a plaintiff in a single action could bring up on appeal several interlocutory orders after voluntary dismissals with prejudice. So long as he prevailed on appeal the orders would be reversed and the case proceed until the next interlocutory order which he chose to test.

Thus, in the present action, if the appellant is allowed to appeal and is successful, presumably the case will continue. Perhaps the next order the appellant will ask to be relieved would be an order to disclose the names of

allegedly confidential informants, or to specify the documents relating to each of the alleged offenses, a matter as to which the defendants have been inquiring unsuccessfully since the complaint was filed four years ago. From a voluntary dismissal with prejudice the appellant could again appeal.

Thus the result of the adoption of a principle that voluntary dismissals are appealable would be to confer upon any plaintiff the power to secure an interlocutory appeal. This is not the statutory scheme.

If orders are entered which are not appealable, piecemeal appeals by taking successive voluntary dismissals, with or without prejudice, are not permissible. The fact that a contrary doctrine would permit circumvention of the statutory restriction of appellate jurisdiction to final judgments has probably been a reason why the federal courts have uniformly refused to review such voluntary dismissals. Two of the leading cases on the appealability of voluntary dismissals, *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936), and *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir. 1906), specifically discuss this problem.

Furthermore, one of the points made by Judge Parker in the *Kelly* decision is that even the few states allowing appeals from voluntary nonsuits deny appeals where the ruling sought to be reviewed relates only to a preliminary question:

> "Even in those rare jurisdictions, of which North Carolina is one, which permit appeal from an order of voluntary nonsuit where there is a ruling of the court which strikes at the heart of the case and precludes recovery by plaintiff, appeal from such order does not lie to review rulings which do not have the effect of determining the case against plaintiff" (86 F. 2d 296).

In other words, no jurisdictions permit appeals through voluntary nonsuits from rulings not for practical purposes dispositive of the issues on the merits. Refusal to order discovery by the defendant might under certain circumstances strike at the heart of a plaintiff's case; but ordering discovery by the plaintiff could never do so. Thus under no system of practice could an order to the plaintiff to produce documents be reviewed on a voluntary dismissal. Otherwise it would be impossible to limit appellate jurisdiction.

It is clear that the appellant here, having chosen not to appeal directly from the original production orders, had in mind the restrictions on interlocutory appeals. Its attempt to cause the entry of a final judgment must have been designed to avoid these restrictions. To allow such an attempt to succeed would permit a degree of circumvention of the statutes relating to appeals not possible even in the few jurisdictions which permit appeals from voluntary nonsuits in special situations.

If the appellant had applied for an extraordinary writ this Court would have had discretion to consider whether the original production orders were of a nature appropriate for direct review. By following the procedure it did, the appellant sought instead to foreclose that question and force this Court to review those orders and decide the issues raised by them.

The record shows that the appellant was well aware of the orderly procedures available for testing the reviewability of the production orders. It chose not to pursue them. It chose dismissal instead. Preservation of the limits of appellate jurisdiction requires that there be no review of this free choice.

POINT IV.

The orders to produce transcripts of grand jury testimony were a proper exercise of discretion by the court below.

For the foregoing reasons we submit that the merits of the orders to produce transcripts of grand jury testimony are not reviewable on this appeal. Even if the merits could be reached, however, we submit that it is manifest that the judgments below should be affirmed.

The court's orders are supported by two separate grants of discretionary power. Rule 6(e) of the Federal Rules of Criminal Procedure gives the court discretion to direct an attorney for the Government to disclose matters occurring before the grand jury in connection with a judicial proceeding. Rules 30(b) and 34 of the Federal Rules of Civil Procedure give the court discretion to order production of documents in the possession of parties, subject to the requirements of those rules. See *Hickman* v. *Taylor,* 329 U. S. 495, 512.

There is no question, apart from an asserted privilege against disclosing grand jury minutes to non-Government personnel, that ordering production of the minutes was a reasonable exercise of discretion. It is clear that good cause existed for their production. The present action was an antitrust suit involving the major producers in a major industry. All the signs of development into a "big case" were present. It has been generally recognized as one of the administrative principles of such litigation that each party should be compelled to make full disclosure to the other.

Here, however, the appellant is seeking to retain a large body of testimony, covering many or perhaps all of the

issues of the action, for its sole use. It is conceded that the Department of Justice has used the transcripts in the preparation and prosecution of this civil action, and will seek to use them at the trial, if there is a trial, to the extent that it deems advisable. It is idle to suggest as is done at page 7 of the jurisdictional statement that the information contained in the witnesses' testimony in 1951 and 1952 could now be duplicated by depositions, entirely apart from the time and expense involved in such an effort. The appellees do not know the areas explored. The witnesses would not recall the answers given. While we stated to the court below that we knew the identity of 28 witnesses called, we do not know how many more may have been called.

Moreover, the creation of a second set of transcripts on roughly the same subject matter would in no way lessen the advantage the Department of Justice would have through exclusive possession of the earlier transcripts, created with the witnesses at a maximum disadvantage in the isolation of the grand jury room, available for impeachment or refreshing recollection. Apart from the policy of grand jury secrecy, there is no reason that the Department of Justice should possess this advantage in this civil action, nor has any ever been suggested.

This Court said in *Hickman* v. *Taylor*, 329 U. S. 495, 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts

"[8] 'One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual —that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

With specific reference to statements of witnesses this Court said:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning" (329 U. S. 511-2).

Transcripts of grand jury testimony are, of course, not mere statements of witnesses. They are created through process of the court, subject to penalties of contempt and perjury. They cannot be duplicated by counsel for defendants, no matter how ingenious or diligent. To give the advantage of possession of such testimony to one side but not the other clearly contravenes the liberal discovery pro-

cedure of the Federal Rules of Civil Procedure. To do so would be tantamount to allowing one party only to take depositions *ex parte*. Only some overriding consideration of public policy should permit such a result.

The appellant tries to pursue both sides of the argument. It says on the one hand that the appellees can obtain all the facts in the transcripts by taking the depositions of the witnesses. It says on the other hand that disclosure of these selfsame facts by producing the transcripts violates the public policy protecting the secrecy of grand jury proceedings, particularly to the extent that the policy of secrecy encourages witnesses to testify freely (Jurisdictional statement, page 9). Yet if the witnesses' testimony is the same, there can be no consideration of secrecy; and if it is different, the appellees will not have obtained the facts in the transcripts.

We suggest that this inconsistent position illustrates that the Department of Justice, as the beneficiary in this adversary proceeding of the exclusive possession of this testimony, is disarmed to argue the question of public policy. The continued assertion of counsel for the appellant of their right themselves to use these transcripts as they see fit, including use at the trial, shows that their interest is in the preservation not of secrecy but of their competitive advantage.

There would even appear to be a question whether the Department of Justice has any standing to protest on appeal the exercise of the court's discretion in ordering disclosure. The grand jury is often referred to as an arm of the court, *e.g.*, *Carlson* v. *United States*, 209 F. 2d 209, 213 (1st Cir. 1954). It is by no means an arm of the executive. Indeed this Court has said that its most valuable function is "not only to examine into the commission of crimes, but to stand

between the prosecutor and the accused", *Hoffman* v. *United States*, 341 U. S. 479, 485. Rule 6(e) imposes upon attorneys for the Government an obligation to disclose matters occurring before the grand jury only when directed by the court. It confers upon them no right to preservation of secrecy, and no duty to instruct the court as to public policy.

Certainly no weight can be given to a "claim of privilege" to the grand jury transcripts as "executive papers" based upon the happenstance that the Attorney General rather than the court has physical possession of them (Jurisdictional statement, page 8). The Attorney General bases this "claim of privilege" procedure on *United States* v. *Reynolds*, 345 U. S. 1, a case clearly inapplicable, inasmuch as it dealt with an effort to inquire into secret electronic equipment on a military aircraft, which equipment was not shown to have any causal connection with the accident which was the subject of the action. When the Secretary of the Air Force submitted a claim of privilege as to these military secrets, he was undeniably acting with respect to matters for which he was the responsible official.

The Attorney General, on the contrary, has no such position. He must stand here like any other civil litigant trying to preserve a competitive advantage. That this advantage was secured by what may well be regarded as a perversion of the grand jury process through its use to prepare and try a civil action is no basis for its preservation. A review of the proper role of the grand jury as outlined by this Court in such decisions as *Hoffman* v. *United States*, 341 U. S. 479, 485, and *Hale* v. *Henkel*, 201 U. S. 43, raises grave questions as to the propriety of such a procedure.

However that may be, it is apparent that none of the historic reasons for secrecy of grand jury proceedings is a basis for withholding disclosure here. The grand jury

ceased to sit more than four years ago. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4, this Court said:

> "Grand jury testimony is ordinarily confidential. See Wigmore, supra, §2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

Section 2362 of 8 Wigmore, *Evidence* (3d ed. 1940) reads in part as follows:

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The secrecy is the State's inducement for obtaining testimony. • • •
>
> • • • • • •
>
> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:
>
> • • • • • •
>
> "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:
>
> • • • • • •
>
> "• • • Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the

same reasons noted in par. (1), *supra*. Furthermore, in the other rare contingencies in which his testimony before the grand jury might become relevant (*post*, §2363, par. 2), justice requires in any case that Doe should not be exempted from disclosure.

"There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended*, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue.

"This is, in effect, the law as generally accepted to-day. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required '*whenever it becomes necessary in the course of justice.*' Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle."

The most recent statement of the reasons for secrecy appears to be that in *United States* v. *Rose*, 215 F. 2d 617, 628-9 (3d Cir. 1954):

"In United States *v.* Amazon Industrial Chemical Corp., D. C. Md. 1931, 55 F. 2d 254, 261, the reasons generally given for this rule of secrecy were summarized as follows: (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under

investigation, and from the expense of standing trial where there was no probability of guilt."

On the face of the matter, only the fourth reason could have any application in the present case. Wigmore, however, shows that the policy of secrecy to encourage witnesses to testify does not survive the duties of the grand jury, and a contrary rule would encourage perjury. This also was the view of the court below.

It is particularly incongruous for the appellant, who boldly asserts the right to use the grand jury for the purpose of civil discovery in antitrust cases (Jurisdictional statement, pages 14-15, fn. 7) to assert also a "privilege" as to this discovery on the ground that witnesses in antitrust investigations would not testify freely if their testimony might later be disclosed (Jurisdictional statement, page 9). Here indeed is a far cry from the traditional role of the grand jury as a shield between the prosecutor and the accused. The appellant seeks rather to convert it into a sword against the civil antitrust defendant, all in the name of preserving the sanctity of the grand jury process.

Entirely without application are such cases as *Costello* v. *United States*, 350 U. S. 359, and *United States* v. *Johnson*, 319 U. S. 503, upon which appellant relies. These decisions do not relate to discovery of testimony of witnesses before the grand jury. They are addressed to efforts to overturn the indictment in criminal actions through allegations that they were improperly returned. Even the many decisions refusing to allow inspection of grand jury minutes for alleged irregularities do not raise the question of secrecy as such but rather of the orderly administration of justice. Certainly the courts should not be placed in the position of conducting a "preliminary trial to determine the competency and adequacy of the evidence before the grand jury", *Costello* v. *United States*, 350 U. S. 359, 363.

This would be so, however, whether grand jury proceedings were secret or not. The implication at page 6 of the jurisdictional statement that the *Costello* decision relates to disclosure of grand jury testimony is without basis.

The grand jury having long since ceased to sit, and the reasons for the policy of secrecy not being applicable, it cannot be said that the district court abused its discretion in ordering disclosure. The transcripts being clearly relevant and good cause having been shown for their production, it cannot be said that the court abused its discretion in ordering production. It is, therefore, respectfully submitted that even if the merits of the orders for production of grand jury testimony can be reached on this appeal, the judgments below should nevertheless be affirmed without further argument.

Conclusion.

The appeal should be dismissed or, in the alternative, the judgments below should be affirmed.

Respectfully submitted,

MATHIAS F. CORREA,
Cahill, Gordon, Reindel & Ohl,
63 Wall Street,
New York 5, New York,
Attorney for Appellee
Colgate-Palmolive Company.

Of Counsel:

JERROLD G. VAN CISE,
JAMES B. HENRY, JR.,
New York, New York.

January 2, 1957

Office - Supreme Court, U.S.
FILED
JAN 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 695

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

KENNETH C. ROYALL,
Dwight, Royall, Harris, Koegel & Caskey,
100 Broadway,
New York 5, N. Y.

CHARLES SAWYER,
603 Dixie Terminal Building,
Cincinnati, Ohio.

Attorneys for Appellee, The Procter & Gamble Company

Of Counsel:
FREDERICK W. R. PRIDE
RICHARD W. BARRETT
H. ALLEN LOCHNER

INDEX

	PAGE
MOTION TO DISMISS OR AFFIRM	1
STATEMENT	1
ARGUMENT	8
I.—BOTH THE "AMENDED ORDER" OF AUGUST 21, 1956 AND THE JUDGMENT OF SEPTEMBER 13, 1956 WERE CONSENTED TO BY THE PLAINTIFF	8
II.—THE PLAINTIFF WAS NOT FORCED OR REQUIRED TO MOVE FOR AND TENDER THE ORDER OF AUGUST 21, 1956, WHICH LED TO THE JUDGMENT OF SEPTEMBER 13, 1956	10
III.—EVEN IF DISMISSAL HAD BEEN INEVITABLE, PLAINTIFF'S CONSENT THERETO DESTROYS THE RIGHT TO REVIEW	11
IV.—THE CONSEQUENCES OF CONSENT TO DISMISSAL ARE NOT AFFECTED BY MOTIVE OR PURPOSE	13
V.—PLAINTIFF'S CONSENT TO A DISMISSAL, THOUGH GIVEN FOR THE PURPOSE OF APPEAL, DOES NOT RENDER THE DISMISSAL APPEALABLE	15
VI.—SPECIFICALLY, A VOLUNTARY DISMISSAL BECAUSE OF AN ADVERSE DISCOVERY RULING IS NOT REVIEWABLE	16
VII.—THE RULES FORBIDDING APPEALS FROM INTERLOCUTORY ORDERS WOULD BE ABROGATED IF AN APPEAL COULD BE TAKEN FROM A CONSENT DISMISSAL	18
CONCLUSION	19

CITATIONS

CASES: PAGE

Alexander v. *United States*, 201 U. S. 117 (1906) .. 16
Allen v. *A. & C. Air Line R. Co. et al.*, 216 S. C. 188, 57 S. E. 2d 249 (1950) 12
Apex Hosiery Co. v. *Leader*, 3 Cir., 102 F. 2d 702 (1939) 16
Appeal of United States Securities & Exchange Com'n, 6 Cir., 226 F. 2d 501 (1955) 14
Bailey v. *Barnes*, 188 N. C. 378, 124 S. E. 742 (1924) 12
Ballot v. *United States*, 1 Cir., 171 Fed. 404 (1909) . 8, 15
Bank Line v. *United States*, 2 Cir., 163 F. 2d 133. (1947) 18
Bowman Dairy Co. v. *United States*, 341 U. S. 214 (1951) 14
Costello v. *United States*, 350 U. S. 359 (1956) 4
Evans against *Phillips*, 4 Wheat. 73 (1819) 8
Ford v. *Houston & T. C. R. Co.*, 58 Tex. Civ. App. 556, 124 S. W. 715 (1910) 12
Francisco v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354 (1906) 8, 12, 18
Halpern v. *Gunn*, Mun. App. D. C., 57 A. 2d 741 (1948) 17
Hickman v. *Taylor*, 329 U. S. 495 (1947) 3, 13
Hill v. *Clark*, 209 N. C. 358, 183 S. E. 367 (1936) .. 12
International Carrier-Call & Tel. Corp. v. *Radio Corp.*, 2 Cir., 142 F. 2d 493 (1944) 8, 17
J. A. Doggett, G. W. Allen and H. G. Allen v. *R. L. Hunt*, 5 Cir., 199 F. 2d 152 (1952) 8
Kelly v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296 (1936) 8, 12, 15, 19
Marks v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925) 8, 12, 17

PAGE

Marlboro Cotton Mills v. *O'Neal*, 114 S. C. 459, 103 S. E. 781 (1920) 12

Mobley v. *Watts*, 98 N. C. 284, 3 S. E. 677 (1887) 12

Pacific R. R. v. *Ketchum*, 101 U. S. 289 (1879) 8, 9

Rudolph v. *Senseney*, C. A. D. C., 39 App. D. C. 385 (1912) 8, 9, 12, 17

Stewart v. *Lincoln-Douglas Hotel Corp.*, 7 Cir., 208 F. 2d 379 (1953) 8, 9

The United States v. *Evans*, 5 Cranch 280 (1809) 8, 12, 17

Thomsen v. *Cayser*, 243 U. S. 66 (1917) 8

U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) 3

United States v. *All American Airways, Inc.*, 9 Cir., 180 F. 2d 592 (1950) 8

United States v. *Babbitt*, 104 U. S. 767 (1881) 8, 9, 15

United States v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 497 (1955) 3

United States v. *Costello*, S. D. N. Y., 16 F. R. D. 428 (1954), *aff'd* 2 Cir., 222 F. 2d 656 (1955), *cert. den.* 350 U. S. 847 (1955) 14

United States v. *Johnson*, 319 U. S. 503 (1943) 4

United States v. *Procter & Gamble Company*, D. N. J., 19 F. R. D. 122 (1956) 2, 3

United States v. *Procter & Gamble Company*, D. N. J., 19 F. R. D. 247 (1956) 2, 4

United States v. *Rose*, 3 Cir., 215 F. 2d 617 (1954) 3

United States v. *Star Const. Co.*, 10 Cir., 186 F. 2d 666 (1951) 8, 9

United States v. *Wallace Co.*, 336 U. S. 793 (1949) 8, 12, 13

Vaughan v. *City Bank & Trust Company, Natchez, Miss.*, 5 Cir., 218 F. 2d 802 (1955), *cert. den.* 350 U. S. 832 (1955) 8

Water-Works Co. v. *Barret*, 103 U. S. 516 (1880) 8, 9

PAGE

STATUTES:

Expediting Act as amended (Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, as amended by Sec. 17 of the Act of June 25, 1948, 62 Stat. 869, 989) .....

Sherman Act (Act of July 2, 1890, 26 Stat. 209; 15 U. S. C. §§ 1, 2 and 4) .....

MISCELLANEOUS:

Annotation, *Appellate Review At Instance of Plaintiff Who Has Requested, Induced or Consented to Dismissal or Nonsuit*, 23 A. L. R. 2d 664 (1952)

Federal Rules of Civil Procedure, Rule 37 (b) ....

Revised Rules of The Supreme Court of The United States, Rule 16 .....

8 Wigmore, *Evidence* (3d Ed. 1940) § 2362 .....

PAGE

2

2

13

11

1

3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA,
Appellant,
v.
THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

No. 609

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

Appellant, the plaintiff below, has appealed from judgments dismissing this action. These judgments of dismissal were originated, caused and consented to by the plaintiff. Accordingly, the defendant, The Procter & Gamble Company (hereinafter called "Procter"), acting pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby moves that this Court either dismiss the appeal or affirm the dismissal judgments.

STATEMENT

The District Court of the United States for the District of New Jersey on September 13, 1956, entered judgments dismissing an action brought by the United States against

the appellees under Sections 1, 2 and 4 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209; 15 U. S. C. Secs. 1, 2 and 4). The plaintiff is now seeking to appeal under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Sec. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

It is in order for this Court to pass upon this motion to dismiss or affirm before it is required to consider a long record (more than 1850 pages) and involved issues which, we submit, are not properly before the Court.

The Appendix to plaintiff's Jurisdictional Statement and the defendants' Joint Appendix, both filed in this Court, show the following:

Testimony was presented by the Government before a federal Grand Jury sitting in Newark, New Jersey, in connection with an investigation of possible antitrust law violations in the soap and synthetic detergent industry. No indictment was ever returned, and the Grand Jury was discharged on November 25, 1952. About two weeks later, on December 11, 1952, plaintiff commenced the instant civil action (Jurisdictional Statement, pp. 11-12).

Thereafter, motions were filed by Procter on September 24, 1954, and by the other defendants in November 1955, for leave to defendants to inspect and copy the transcripts of the Grand Jury testimony (Joint appendix, pp. 1, 5, 6, 8). The defendants contended, and plaintiff finally admitted, that plaintiff used the Grand Jury testimony both in determining whether its civil action should be brought and also in actually bringing the action, and that plaintiff used and continued to use the Grand Jury testimony in preparing for the trial of the civil action.[1] The defendants claimed that under the Rules of Civil Procedure they were entitled to

[1]See Jurisdictional Statement, pp. 13-17, 23, 53; *United States v. Procter & Gamble Company*, D. N. J., 19 F. R. D. 122, 123-5, 128 (1956); *United States v. Procter & Gamble Company*, D. N. J., 19 F. R. D. 247, 250 (1956).

equal access to that testimony and that it was essential to the preparation of their defenses.

After submission of exhaustive briefs and a full hearing, the District Court, in an opinion filed on April 17, 1956, held that the motions to inspect and copy the Grand Jury transcripts should be granted (Jurisdictional Statement, p. 11).[2]

In this opinion, the court found that the plaintiff had used and intended to use the Grand Jury testimony in bringing and preparing the civil case, which fact the plaintiff reluctantly but finally admitted (Jurisdictional Statement, p. 53). The court also found that the transcripts must, therefore, contain evidence relevant and necessary in the case. Accordingly, the court ruled that, in line with *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947), the ends of justice required that all parties should have mutual knowledge of the Grand Jury testimony, particularly in the so-called "Big Case."

The court held that none of the reasons for secrecy, as summarized in *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 628 (1954), applied. The court, relying on such authorities as *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233, 234 (1940), *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197 (1955) and 8 Wigmore, *Evidence* (3d Ed. 1940) § 2362, also held on the facts of this case that, the Grand Jury having been discharged, disclosure was proper.

The court clearly distinguished certain criminal cases involving attempts by defendants to obtain production of the transcripts with a view to attacking the validity of the indictments and contesting the adequacy of evidence before

---

[2] *United States* v. *Procter & Gamble Company*, D. N. J., 19 F. R. D. 122 (1956).

the Grand Jury to sustain an indictment.[3] The court pointed out that such cases had no application to the instant civil case where disclosure of the transcripts was sought for discovery purposes in connection with trial.

Accordingly, the District Court found that "this case" was one in which "the requirement of secrecy * * * can be safely waived and the minutes of the grand jury divulged * * *, and that the failure to do so would be an abuse of discretion and not in the furtherance of justice" (Jurisdictional Statement, p. 22).

The plaintiff then moved for reconsideration and for a ruling on plaintiff's renewed claim of privilege. The District Court, in a second opinion on July 9, 1956, again rejected the claim of privilege and adhered to the position taken in the opinion of April 17th (Jurisdictional Statement, p. 49).[4]

Proposed orders requiring plaintiff within thirty days to produce and permit the defendants to inspect and copy the transcripts of the Grand Jury testimony were submitted to the District Court at a hearing on July 23, 1956. During the hearing counsel for plaintiff said (Joint appendix, p. 13):[5]

> "Mr. McDowell: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered."

---

[3] *Costello* v. *United States*, 350 U. S. 359 (1956), and *United States* v. *Johnson*, 319 U. S. 503 (1943), relied on by plaintiff in its Jurisdictional Statement, are cases of this nature.

[4] Reported as *United States* v. *Procter & Gamble Company*, D. N. J., 19 F. R. D. 247 (1956).

[5] The full transcript of this hearing is set forth in the Joint appendix at pp. 11-15.

In connection with the thirty day period for production, plaintiff's counsel thereupon said (Joint appendix, p. 14):

> "* * * it makes no difference to the position of the Government. I was instructed to state that the Government will respectfully decline to produce them."

At the conclusion of the July 23rd hearing, the District Court signed the thirty day production order, which was entered shortly thereafter (Joint appendix, p. 16).[6]

On August 15, 1956, before the thirty day period for production had expired, plaintiff moved, first, to amend the production order, and second, to stay the production order. With its motion, plaintiff itself tendered a proposed amended order which provided:

> "Ordered that unless the plaintiff on or before August 24, 1956 produces * * * and permits each of the defendants or their counsel to inspect and copy * * * all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein."[7]

Plaintiff's motion and tendered order contained the first and only proposal, or even intimation, that dismissal should be the remedy if plaintiff failed to produce. With its motion, plaintiff filed an affidavit of the Attorney General. The affidavit, in urging entry of the proposed amended order of production or dismissal, stated (Joint appendix, p. 27):

> "* * * it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court

[6]The orders with respect to the other defendants were identical (Joint appendix, pp. 18, 20, 22).

[7]Plaintiff's motion, proposed order, affidavit of Herbert Brownell, Jr. and brief are set forth in the Joint appendix at pp. 24-31.

> order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

At the hearing on August 21, 1956, of plaintiff's motion for production or dismissal, plaintiff reiterated that it was seeking to change the form of the order so as to obtain appellate review therefrom without having to disobey the order, and again adverted to the "unseemly position" of disobeying a production order. (Joint appendix, pp. 34-36).[8]

In answer to plaintiff's motion for production or dismissal, Procter stated orally and in writing at the August 21st hearing:

> "* * * that the order herein dated July 23, 1956, is a proper and sufficient order at this stage of the proceedings.
>
> "However, without waiving this position Procter further states that the plaintiff's *proposed relief* of production or dismissal does not seem to be a relief which Procter could in any manner oppose" (emphasis supplied).[9]

The District Court thereupon signed plaintiff's proposed amended order, providing in substance, as we have said, that unless plaintiff produced the Grand Jury transcripts on or before August 24, 1956, "the Court will enter an order dismissing the complaint herein" (Jurisdictional Statement, p. 55).

---

[8]The full transcript of this hearing is set forth in the Joint appendix at pp. 33-39.

[9]Joint appendix, p. 37; see also Procter's Answer of August 21, 1956, to Plaintiff's Motion of August 10, 1956, set forth in the Joint appendix at p. 32. The other defendants took similar positions.

Plaintiff, in accord with its prior announcements on July 23rd, did not produce the transcripts. On September 6, 1956, the court inquired of counsel for all parties "whether the plaintiff has produced as directed in the last paragraph of the amended order." Its inquiry concluded, "If the plaintiff has not produced, the court will enter an order dismissing the complaint *as provided in the amended order*" (Joint appendix, p. 41; emphasis supplied). Plaintiff replied: "*In response to your inquiry* I must respectfully state that plaintiff has not produced the grand jury transcripts for inspection by the defendants" (Joint appendix, p. 42; emphasis supplied). Each defendant replied to similar effect, and enclosed for the court's consideration suggested forms of judgments. The judgments, in substantially similar form, were filed September 13, 1956 (Jurisdictional Statement, pp. 56-9). The judgment as to Procter, for example, provided:

> "It appearing to the court that plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcripts of the Grand Jury testimony referred to in the prior Orders of this Court,
>
> "Now, therefore, on the record in this case it is
>
> "Ordered, adjudged and decreed that, as to the defendant The Procter & Gamble Company, this action be and the same is hereby dismissed."

ARGUMENT

I.

BOTH THE "AMENDED ORDER" OF AUGUST 21, 1956 AND THE JUDGMENT OF SEPTEMBER 13, 1956 WERE CONSENTED TO BY THE PLAINTIFF.

On appeal from a judgment or decree invited by or rendered with the consent of appellant, this Court will not consider any errors waived by such invitation or consent. Either the appeal will be dismissed or the judgment will be affirmed. *The United States* v. *Evans*, 5 Cranch 280 (1809); *Evans* against *Phillips*, 4 Wheat. 73 (1819); *Pacific R. R.* v. *Ketchum*, 101 U. S. 289 (1879); *Water-Works Co.* v. *Barret*, 103 U. S. 516 (1880); *United States* v. *Babbitt*, 104 U. S. 767 (1881); *Francisco* v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354 (1906); *Ballot* v. *United States*, 1 Cir., 171 Fed. 404 (1909); *Rudolph* v. *Sensener*, C. A. D. C., 39 App. D. C. 385 (1912); *Marks* v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296 (1936); *International Carrier-Call & Tel. Corp.* v. *Radio Corp.*, 2 Cir., 142 F. 2d 493 (1944); *United States* v. *All American Airways, Inc.*, 9 Cir., 180 F. 2d 592 (1950); *United States* v. *Star Const. Co.*, 10 Cir., 186 F. 2d 666 (1951); *J. A. Doggett, G. W. Allen and H. G. Allen* v. *R. L. Hunt*, 5 Cir., 199 F. 2d 152 (1952); *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 7 Cir., 208 F. 2d 379 (1953); see *United States* v. *Wallace Co.*, 336 U. S. 793, 794-5, fn. 1 (1949).[10]

[10] *Vaughan* v. *City Bank & Trust Company, Natchez, Miss.*, 5 Cir., 218 F. 2d 802 (1955), *cert. den.* 350 U. S. 832 (1955), might appear to be somewhat inconsistent with the long line of authorities cited above. It appears, however, that plaintiff was not represented by counsel, and the record, though perhaps inartistic, plainly showed, according to the opinion, that the order, unlike the instant case, was "an involuntary dismissal for want of prosecution" and therefore appealable (p. 803). Cases such as *Thomsen* v. *Cayser*, 243 U. S. 66

The consent which results in dismissal of the appeal or affirmance of the judgment may be express or may be implied from a variety of circumstances. *E.g., Pacific R. R.* v. *Ketchum, supra; Water-Works Co.* v. *Barret, supra; United States* v. *Babbitt, supra; Rudolph* v. *Sensener, supra; Stewart* v. *Lincoln-Douglas Hotel Corp., supra;* see *United States* v. *Star Const. Co., supra.*

In the instant case, plaintiff itself moved for and actually tendered the order (signed by the court on August 21st), which provided that the court would dismiss the complaint unless plaintiff produced the Grand Jury transcripts by August 24th. It was this motion which originated and was the sole cause of the dismissal of this action. Neither Procter nor any other defendant sought, suggested or intimated a dismissal or did anything to contribute thereto. Nor did the court do so.

Plaintiff, in its Jurisdictional Statement (p. 5, fn. 3), contends that defendants consented to the August 21st order. It would be immaterial if this were true, as the consent of a defendant to the dismissal of the litigation would not justify an appeal by the plaintiff, which had also consented. *Pacific R. R.* v. *Ketchum,* 101 U. S. 289 (1879); *Stewart* v. *Lincoln-Douglas Hotel Corp.,* 7 Cir., 208 F. 2d 379 (1953). However, the defendants did not in fact consent to the August 21st order. Procter's only statement in connection therewith was that the July 23rd order was sufficient but that Procter, as a defendant in the action, did not believe that it could oppose plaintiff's proposed *relief*, which provided for dismissal of the complaint if the Grand Jury transcripts were not produced (Joint appendix, pp. 32, 36-37).

(1917), are merely instances where a plaintiff, after judgment in his favor is reversed by a federal Court of Appeals, waives his right to a new trial so that an immediate writ of error to the Supreme Court might be taken. They are not regarded as appeals from consent judgments.

It is perhaps supererogation to point out that the August 21st order tendered by plaintiff was intended to result in the dismissal of the action and nothing else. For, before plaintiff tendered that order, it had formally announced in court on direct instructions from the Attorney General that plaintiff would not at any time produce the Grand Jury transcripts which the court had, on July 23rd, ordered to be produced (Joint appendix, pp. 13-14).

The September 13th judgment of dismissal was merely the implementation of the order of August 21st. The judgment stemmed directly from the express and mandatory provision of that order that "the Court *will* enter an order dismissing the complaint" on plaintiff's failure to produce the transcripts (emphasis supplied). The matter of production was solely plaintiff's decision—which it had already announced. So when plaintiff failed to produce, the September 13th judgment followed as a matter of course from the August 21st order. It did not require the court to make any further decision or to exercise any discretion.

For all these reasons, plaintiff's consent to the September 13th judgment is entirely clear. In fact, the District Court in its September 6th letter, which was acknowledged by plaintiff, expressly stated that the dismissal would be "as provided in the amended order" of August 21st (Joint appendix, p. 41). The September 13th judgment, therefore, like the August 21st order, is not appealable.

II.

THE PLAINTIFF WAS NOT FORCED OR REQUIRED TO MOVE FOR AND TENDER THE ORDER OF AUGUST 21, 1956, WHICH LED TO THE JUDGMENT OF SEPTEMBER 13, 1956.

Despite the ambiguous and misleading assertion on page 3 of plaintiff's Jurisdictional Statement, the record shows without any ambiguity that at no time prior to entry

of plaintiff's proposed and tendered order of August 21st had the production of the transcripts been ordered "on pain of dismissal of the suit". The July 23rd order merely required production of the transcripts, and nothing more. There had not been a single intimation as to the nature of the remedy to be adopted in case plaintiff did not produce—nothing to indicate that dismissal would have been requested by the defendants or ordered by the court.

The Federal Rules of Civil Procedure provide for various other remedies in the event of failure to comply with a discovery order (Rule 37[b]). For example, further proceedings may be stayed until the order is obeyed, or there may be a citation for contempt, or the court may "make such orders in regard to the refusal as are just," that is, such other and different remedies as may be appropriate under the circumstances. Indeed, there is no requirement that any particular remedy be sought or ordered.

Obviously, therefore, dismissal need not follow failure to produce, and plaintiff was not consenting to the inevitable when it moved for and tendered the order of August 21, 1956. To the contrary, plaintiff by its own conduct made inevitable a dismissal which might otherwise never have occurred, and which in similar situations has not occurred, even where there is no production.

III.

EVEN IF DISMISSAL HAD BEEN INEVITABLE, PLAINTIFF'S CONSENT THERETO DESTROYS THE RIGHT TO REVIEW.

Even if we could assume, quite contrary to the fact, that dismissal of the action was an inevitable consequence of plaintiff's failure to produce the transcripts, plaintiff's consent to dismissal has nevertheless destroyed its right to appeal and has foreclosed it from challenging error in the dismissal.

Indeed, even in those instances where a prior adverse ruling is fatal to a plaintiff's case—which, of course, is not true of the July 23rd discovery ruling—plaintiff's consent to dismissal destroys his right to a review in the federal courts. *Francisco* v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354 (1906); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 295 (1936); see *The United States* v. *Evans*, 5 Cranch 280 (1809); *Marks* v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925); *Rudolph* v. *Sensener*, C. A. D. C., 39 App. D. C. 385 (1912); cf. *United States* v. *Wallace Co.*, 336 U. S. 793, 794-5, fn. 1 (1949). In the words of *Rudolph* v. *Sensener*, *supra*, "The situation is of their [plaintiffs'] own creation, no matter what was the inducement thereto, and there is nothing from which they can appeal" (p. 388). The point is made clear in *Kelly* v. *Great Atlantic & Pacific Tea Co.*, *supra*, where Judge Parker states (p. 297):

> "* * * we now definitely hold that whether or not an appeal lies from a voluntary nonsuit is a matter of appellate practice, as to which the Conformity Act (28 U. S. C. A. § 724) does not govern, and that in the federal courts no appeal lies from such voluntary order, whether taken upon a ruling determinative of the rights of the parties or not."[11]

---

[11]Some state courts apparently consider a voluntary dismissal resulting from a prior adverse ruling appealable, on the questionable theory that plaintiff's consent was coerced. See, *e.g.*, *Mobley* v. *Watts*, 98 N. C. 284, 3 S. E. 677 (1887); *Marlboro Cotton Mills* v. *O'Neal*, 114 S. C. 459, 103 S. E. 781 (1920); *Ford* v. *Houston & T. C. R. Co.*, 58 Tex. Civ. App. 556, 124 S. W. 715 (1910). Even in the state courts, however, the prior adverse ruling must have been one which was fatal to plaintiff's recovery—which was not so in the instant case. See, *e.g.*, *Bailey* v. *Barnes*, 188 N. C. 378, 124 S. E. 742 (1924); *Hill* v. *Clark*, 209 N. C. 358, 183 S. E. 367 (1936); *Allen* v. *A. & C. Air Line R. Co. et al.*, 216 S. C. 188, 57 S. E. 2d 249 (1950); *Ford* v. *Houston & T. C. R. Co.*, 58 Tex. Civ. App. 556, 124 S. W. 715 (1910). Decisions in the state courts are in nowise controlling or even applicable. Moreover, so far as we know, no jurisdictions permit appeals through voluntary nonsuits from

United States v. *Wallace Co.*, 336 U. S. 793, 794-5, fn. 1 (1949), is not to the contrary. There, plaintiff was denied the use of documents essential to its case. An appeal from the resulting dismissal of the case was entertained by the Supreme Court, but only because plaintiff did *not* invite the dismissal, as distinguished from the instant case where plaintiff *did* invite it.

IV.

THE CONSEQUENCES OF CONSENT TO DISMISSAL ARE NOT AFFECTED BY MOTIVE OR PURPOSE.

As previously stated plaintiff sought to justify the "amended order" of production or dismissal, because "* * * it would be unseemly * * * to be placed in the dilemma either of having to comply * * * or * * * to disobey * * * without * * * an opportunity for effective appellate review" (Joint appendix, p. 27).

Plaintiff's motives in consenting to a judgment of dismissal have, so far as we know, never been held to be material. Certainly the opinion of a litigant, be it the Government or an individual, as to whether a court order or disobedience thereof is "seemly" could not change established rules of procedure—could not in this case give a right of appeal to one who has consented to a judgment.

The principle is particularly sound in the situation presented here. For a normal and frequently used method for an individual or for the Government to preserve its right of appeal from a production order is by disobeying the order of production, being held in contempt and then appealing. See *Hickman* v. *Taylor*, 329 U. S. 495 (1947);

---

rulings not dispositive of the issues on the merits. See Annotation, *Appellate Review At Instance of Plaintiff Who Has Requested, Induced or Consented To Dismissal or Nonsuit*, 23 A. L. R. 2d 664 (1952).

Bowman Dairy Co. v. *United States*, 341 U. S. 214 (1951). Under this procedure, it is common practice for the trial court to impose a nominal penalty or perhaps to suspend the penalty pending a proper appeal from the court's action. *Appeal of United States Securities & Exchange Com'n*, 6 Cir., 226 F. 2d 501, 520 (1955); *United States* v. *Costello*, S. D. N. Y., 16 F. R. D. 428 (1954), *aff'd* 2 Cir., 222 F. 2d 656 (1955), *cert. den.* 350 U. S. 847 (1955). Thus, there is no basis here for any charges of "unseemly" conduct or of any real embarrassment.

Furthermore, in the instant case, plaintiff's excuse for seeking the consent judgment that it would be "unseemly" to disobey a court order has, on the face of the record, no substance or justification. As we have seen, on July 23rd —weeks before the plaintiff's motion for an "amended order"—plaintiff had solemnly and formally stated that it would not at any time produce the transcripts ordered produced by the court, and this anticipatory, unequivocal and defiant refusal was on express instructions from the Attorney General.

How can plaintiff seriously urge at a later date that it is "unseemly" to be faced with a disobedience it has already announced weeks before? And how could such a contention serve to abrogate the established principles of appellate law and procedure, and to give the plaintiff a right to appeal from an order or judgment which plaintiff originated and to which it consented.

As a matter of fact, plaintiff's contention based on "unseemly" disobedience calls attention to another reason why plaintiff is morally and legally foreclosed from appealing. The August 21st order sought and consented to by plaintiff in order to avoid "unseemly" disobedience did in fact result in extricating plaintiff from the dilemma of producing or disobeying the court's order. It actually gave plaintiff in the District Court the benefit which it sought,

and also saved plaintiff from the possibility of a contempt citation below.

The Government, as well as a private individual, has no right to ask and receive benefits under a court order and then seek to repudiate its legal effect. In this case the plaintiff, having sought and obtained benefits from the consent order must be held to its other consequences, including specifically the loss of any right of appeal.

V.

PLAINTIFF'S CONSENT TO A DISMISSAL, THOUGH GIVEN FOR THE PURPOSE OF APPEAL, DOES NOT RENDER THE DISMISSAL APPEALABLE.

Plaintiff may also advance the "circular" contention that, since its consent to the dismissal was in order to appeal, the consent was nugatory, and that since the consent was nugatory the appeal was proper. The authorities do not support such a position. *United States* v. *Babbitt*, 104 U. S. 767 (1881); *Ballot* v. *United States*, 1 Cir., 171 Fed. 404 (1909); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296 (1936).

The rule of these cases applies to the Government as well as to individuals. The point was disposed of in *United States* v. *Babbitt*, 104 U. S. 767 (1881), where Chief Justice Waite said (p. 768):

> "The question presented to the court below on the trial of this case was, whether in the computation of longevity pay for an officer of the army of the United States, under the provision of sect. 7 of the act of June 18, 1878, c. 263 (20 Stat. 145), his period of service as a cadet at West Point was to be taken into account. The court decided it was not, and an elaborate opinion to that effect was filed; but the record shows that, after the decision

> was announced, a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal. In *Pacific Railroad* v. *Ketchum* (101 U. S. 289), we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion, this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of. For this reason the judgment below must be affirmed; * * *."

In other words, the effect of consent dismissals is not altered by the fact that plaintiff sought a dismissal for the purpose of appealing. If anything, this acknowledged purpose emphasizes the fact that the dismissal was intentional. It also shows a deliberate attempt to evade the established rules of procedure—an attempt which should be condemned rather than condoned.

VI.

SPECIFICALLY, A VOLUNTARY DISMISSAL BECAUSE OF AN ADVERSE DISCOVERY RULING IS NOT REVIEWABLE.

Innumerable discovery rulings or evidence rulings occur daily in the federal courts. Such rulings, including specifically orders for the production of documents, have been held interlocutory and not appealable. *Alexander* v. *United States*, 201 U. S. 117 (1906); *Apex Hosiery Co.* v. *Leader*, 3 Cir., 102 F. 2d 702 (1939). Litigants have consistently been denied the right to obtain a review of such procedural points by devising, initiating or consenting to the conver-

sion of interlocutory—and unappealable—rulings into judgments of dismissal.

Thus, in *The United States* v. *Evans*, 5 Cranch 280 (1809); the United States, which after rejection of certain of its testimony became nonsuit, was not permitted to raise the question on appeal. In *International Carrier-Call & Tel. Corp.* v. *Radio Corp.*, 2 Cir., 142 F. 2d 493, 494 (1944), Judge Swan said of a plaintiff who took a dismissal when his motion to defer evidence on his second count was denied, "Having consented to a final dismissal of the unfair competition count, it is utterly fatuous to suppose that this part of the judgment can be reversed on appeal."

Similarly, in *Marks* v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925), the court indicated that an appeal was not sustainable where the record showed that plaintiff requested dismissal after denial of his application for a commission to take testimony in Germany. See also *Rudolph* v. *Senseney*, C. A. D. C., 39 App. D. C. 385 (1912), and *Halpern* v. *Gunn*, Mun. App. D. C., 57 A. 2d 741 (1948).

This is the universal rule. It is not affected by the correctness or incorrectness of previous rulings, or by the fact that the Government is plaintiff, or by the possibility that public policy is involved, or by whether the case is "important" or "substantial" (see Jurisdictional Statement, pp. 6-10). If, indeed, the matter of "importance" were involved, the most important and substantial question now before the Court is the one we now present, that is, whether a dismissal of an action can be appealed by a plaintiff which invited and consented to it. This is a question which vitally affects the entire administration of federal appellate law.

VII.

THE RULES FORBIDDING APPEALS FROM INTERLOCUTORY ORDERS WOULD BE ABROGATED IF AN APPEAL COULD BE TAKEN FROM A CONSENT DISMISSAL.

If "sleight of hand" experiments, such as have been adopted by plaintiff in this case, could justify an appeal or review of a dismissal on consent, then similar methods could be applied to justify an appeal by any plaintiff, Government or individual, from any or all discovery rulings and from many, if not all, other interlocutory decisions. See *Francisco* v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354, 359 (1906).

The Government, of course, is not to be granted rights of review unavailable to the individual citizen. As Judge Augustus N. Hand said in *Bank Line* v. *United States*, 2 Cir., 163 F. 2d 133, 138 (1947):

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. * * * The existence of governmental privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual, without recourse to prerogative writs where such writs would not be available to the ordinary citizen."

Thus, if a right of review is here sustained, the doors of the appellate courts will be thrown open to all litigants desiring to obtain review of interlocutory orders by "tongue in cheek" consent to dismissals.

To permit review under such circumstances would delegate to plaintiffs in general a large measure of control over the appellate practice of the federal courts, would nullify

the salutary principle forbidding piecemeal appeals and would throw on the appellate courts a heavy burden not contemplated by the appeal statutes. Precedent and logic forbid such evasion of the rules of appellate practice by permitting appeals from interlocutory decisions under the guise of appeals from judgments of dismissal proposed or consented to by plaintiffs. As the court said in the comparable case of *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296, 297 (1936):

> "The crux of the matter is that an order refusing to remand is not a final or appealable order, and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing."

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Dated: January 2, 1957.

Respectfully submitted,

KENNETH C. ROYALL,
Dwight, Royall, Harris,
Koegel & Caskey,
100 Broadway,
New York 5, N. Y.

CHARLES SAWYER,
603 Dixie Terminal Building,
Cincinnati, Ohio.
Attorneys for Appellee, The Procter & Gamble Company.

Of Counsel:
FREDERICK W. R. PRIDE
RICHARD W. BARRETT
H. ALLEN LOCHNER

SUPREME COURT, U.S.
Office
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 371

UNITED STATES OF AMERICA, *Appellant*,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND
GLYCERINE PRODUCERS, INC., *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

MOTION TO DISMISS OR AFFIRM ON BEHALF OF THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.

ADRIEN F. BUSICK
JAMES T. WELCH
SHELBY FITZE
Counsel for Appellee, The Association of American Soap and Glycerine Producers, Inc.

Of Counsel:
DAVIES, RICHBERG, TYDINGS & LANDA
1000 Vermont Avenue, N. W.
Washington 5, D. C.

January 2, 1957.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term, 1956

No. 609

UNITED STATES OF AMERICA, *Appellant*,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND
GLYCERINE PRODUCERS, INC., *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

---

MOTION TO DISMISS OR AFFIRM ON BEHALF OF THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.

The appellee, The Association of American Soap and Glycerine Producers, Inc., a defendant below, pursuant to Rule 16 of the Supreme Court respect-

fully moves this Court either to dismiss the appeal or affirm the dismissal judgments on the grounds that these judgments of dismissal were originated, caused and consented to by the plaintiff, and that plaintiff's consent to dismissal has destroyed its right to appeal and has estopped plaintiff from challenging error in the dismissal.

Respectfully submitted,

ADRIEN F. BUSICK

JAMES T. WELCH

SHELBY FITZE

Counsel for Appellee, The Association of American Soap and Glycerine Producers, Inc.

Of Counsel:
DAVIES, RICHBERG, TYDINGS & LANDA
1000 Vermont Avenue, N. W.
Washington 5, D. C.

STATEMENT AND BRIEF

In support of the foregoing Motion, counsel for appellee, The Association of American Soap and Glycerine Producers, Inc., adopt the statements and briefs of counsel for the appellees, The Procter & Gamble Company, Colgate-Palmolive Company, and Lever Brothers Company, filed in this cause.

Respectfully submitted,

ADRIEN F. BUSICK

JAMES T. WELCH

SHELBY FITZE

Counsel for Appellee, The Association of American Soap and Glycerine Producers, Inc.

Of Counsel:

DAVIES, RICHBERG, TYDINGS & LANDA
1000 Vermont Avenue, N. W.
Washington 5, D. C.

January 2, 1957.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 599.

UNITED STATES OF AMERICA,

Appellant,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

JOINT APPENDIX TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM.

January 2, 1957.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y. U. S. A.

INDEX.

	PAGE
Motion for disclosure of grand jury transcripts filed by The Procter & Gamble Company, dated September 24, 1954. [Tab No. 32]*	1
Motion for disclosure of grand jury transcripts filed by Colgate-Palmolive Company, dated November 28, 1955. [Tab No. 86]	5
Motion for disclosure of grand jury transcripts filed by Lever Brothers Company, dated November 28, 1955. [Tab No. 87]	6
Motion for disclosure of grand jury transcripts filed by The Association of American Soap and Glycerine Producers, Inc., dated November 25, 1955. [Tab No. 84]	8
Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on July 23, 1956. [Tab No. 118]	11
Order for disclosure of grand jury transcripts to The Procter & Gamble Company, dated July 23, 1956. [Tab No. 104]	16
Order for disclosure of grand jury transcripts to Colgate-Palmolive Company, dated July 23, 1956. [Tab No. 105]	18
Order for disclosure of grand jury transcripts to Lever Brothers Company, dated July 23, 1956. [Tab No. 107]	20
Order for disclosure of grand jury transcripts to The Association of American Soap and Glycerine Producers, Inc., dated July 23, 1956. [Tab No. 106]	22

* References are to the tab numbers under which original documents appear in the record as filed with this Court.

PAGE

Motion to amend or stay orders for disclosure of grand jury transcripts filed by the United States, dated August 15, 1956. [Tab No. 109] 24

Proposed form of order amending orders for disclosure of grand jury transcripts attached to motion to amend or stay. [Tab No. 109] 25

Affidavit in support of motion to amend or stay sworn to by Herbert Brownell, Jr. August 14, 1956. [Tab No. 109] 27

Brief in support of motion to amend or stay. [Tab No. 109] 29

Answer to motion to amend or stay filed by The Procter & Gamble Company, dated August 21, 1956. [Tab No. 111] 32

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on August 21, 1956. [Tab No. 119] 33

Letter of the Honorable Alfred E. Modarelli, U. S. D. J. to counsel, dated September 6, 1956. [Tab No. 128] 40

Letter to the Honorable Alfred E. Modarelli, U. S. D. J. from Victor R. Hansen, Assistant Attorney General, Antitrust Division, dated September 7, 1956. [Tab No. 129] 42

Motion for disclosure of grand jury transcripts filed by The Procter & Gamble Company.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, *against* The PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE-PEET COMPANY, LEVER BROTHERS COMPANY, and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., Defendants.	Civil Action No. 1196-52

MOTION FOR ORDER DIRECTING DISCLOSURE OF GRAND JURY TRANSCRIPTS.

The defendant, The Procter & Gamble Company (hereinafter called "Procter") respectfully moves the Court, pursuant to the discovery provisions of the Federal Rules of Civil Procedure and in accordance with the powers of this Court to act in the interest of justice with respect to litigation pending before it, for an order granting leave to Procter and its counsel to inspect and copy, commencing within ten (10) days after the entry of the order herein, the following documents or papers which are either in the possession or control of plaintiff and its counsel or are otherwise within the control of this Court:

The transcripts of the testimony of all witnesses taken before the Grand Jury of the United States District Court

for the District of New Jersey sitting in Newark from May 1951 to November 1952 in connection with an investigation of possible antitrust law violations in the soap and synthetic detergent industry. (See proceeding numbered Cr. 174-51, 175-51, 176-51, 177-51.)

In support of this motion Procter shows to the Court, *inter alia:*

(a) The Grand Jury transcripts record testimony taken in connection with an investigation of whether there were violations of the antitrust laws by the movant and other members of the soap and synthetic detergent industry.

(b) The said transcripts plus the documents obtained by Grand Jury subpoena have been available to and used by the plaintiff in preparation for the instant civil action.

(c) Under orders issued in this case on May 27, 1953, and January 14, 1954, plaintiff, over protest of Procter, has been permitted to retain and use in this civil action documents and information produced in the Grand Jury proceeding which were obtained without the notice provided and the method prescribed for all parties by the Civil Rules and the Statutes.

(d) On the other hand, Procter has not had access to the Grand Jury transcripts, or to other information produced before the Grand Jury.

(e) The said Grand Jury was discharged on November 25, 1952, without returning any indictments against Procter or the other defendants and there is no pending criminal proceeding involving the evidence produced before the Grand Jury. The names of most if not all of those who appeared and testified before the said Grand Jury in connection with the investigation of the soap industry have

n known for many months and it is believed that wit-ses would have no objection to disclosure of their testi-ny. Procter does not seek to discover the deliberations the votes of any Juror. No need exists for preserving secrecy of the said Grand Jury transcripts.

(f). The information contained in the Grand Jury tran-ipts is necessary to Procter for an adequate preparation its defenses to this action, and is relevant to the matters eged in the complaint. The relevancy of such transcripts this civil action is supported by the fact that plaintiff, rsuant to Rule 34, sought and obtained from Procter in s action the same documents which were produced by octer before the said Grand Jury.

(g) Matters pertinent to Procter's defenses will never ome known to Procter unless access to the Grand Jury nscripts is granted by this Court. Denial of such access uld be unjust, discriminatory and prejudicial to Procter this case and would be violative of the spirit and meaning the Statutes and Rules and would deprive Procter of due ocess and equal protection of the laws and would be, erefore, violative of Amendment V of the Constitution of e United States.

At an appropriate time, when Procter believes it is in a sition to frame requests of proper scope, Procter intends move under Rule 34 of the Federal Rules of Civil Pro-dure for leave to inspect and copy documents and papers, the possession or control of plaintiff, which were pro-ced pursuant to the Grand Jury subpoenas as well as

other documents and papers in the possession or control of plaintiff.

Dated: September 24, 1954.

TONER, CROWLEY, WOELPER & VANDERBILT

/s/ JOHN A. ACKERMAN

By per KENNETH C. ROYALL
810 South Broad Street
Newark, New Jersey

/s/ RICHARD W. BARRETT

per KENNETH C. ROYALL
Richard W. Barrett
DINSMORE, SHOHL, SAWYER & DINSMORE
1218 Union Central Building
Cincinnati 2, Ohio

/s/ KENNETH C. ROYALL
Kenneth C. Royall
DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY
100 Broadway
New York 5, New York

Attorneys for Defendant, The Procter & Gamble Company

[Tab No. 32]

Motion for disclosure of grand jury transcripts filed by Colgate-Palmolive Company.

Sirs:

PLEASE TAKE NOTICE that the undersigned will move this Court in the United States Court House, Newark, New Jersey, on the 12th day of December, 1955 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, upon all the proceedings heretofore had herein, for an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure directing disclosure to the defendant Colgate-Palmolive Company of the transcripts of the testimony of all witnesses who testified before the grand jury of this Court sitting in Newark, New Jersey, from May 1951 through November 25, 1952 in connection with an investigation of possible violations of the antitrust laws of the United States in the soap and synthetic detergent industries, and permitting the said defendant to inspect and copy the transcripts of such testimony, and for such other relief as may to the Court seem just and proper.

Dated: November 28, 1955.

Yours, etc.

O'MARA, SCHUMANN, DAVIS & LYNCH

By /s/ EDWARD J. O'MARA
A member of said firm

No. 1 Exchange Place
Jersey City 2, New Jersey

CAHILL, GORDON, REINDEL & OHL
63 Wall Street
New York 5, New York
Attorneys for Defendant
Colgate-Palmolive Company

[Tab No. 86]

Motion for disclosure of grand jury transcripts filed by Lever Brothers Company.

The Defendant Lever Brothers Company respectfully moves the Court for an order

A. Requiring the plaintiff to disclose to said defendant the names of the witnesses appearing before the grand jury of the United States District Court for the District of New Jersey sitting in Newark from May 1951 to November 1952, investigating possible antitrust law violations in the soap and synthetic detergent industry (proceeding numbered Criminal 174-51, 175-51, 176-51, 177-51), and

B. Requiring the plaintiff to permit defendant to inspect and copy the grand jury transcript of the testimony of such witnesses or, in the alternative, of such witnesses appearing before such grand jury as consent to the disclosure of their testimony.

The grounds for this motion are that (1) no privilege of secrecy attaches to the testimony of a witness before the grand jury; (2) Lever Brothers Company is urgently in need of access to such testimony in order to discover in this civil proceeding the evidentiary basis, if any, for the charges in the complaint and to prepare its defense to such charges; and (3) no practicable alternative to such discovery exists under the Federal Rules of Civil Procedure because to attempt to obtain such discovery through depositions of such witnesses would necessarily involve substantial cost and severe inconvenience to all parties, would gravely retard the expeditious preparation of this cause

for trial, and would not in any event produce accurate information because of the lapse of time and other factors.

Respectfully submitted,

BAILEY, SCHENCK & BENNETT

By /s/ ALEXANDER T. SCHENCK
744 Broad Street
Newark, New Jersey

ARNOLD, FORTAS & PORTER

By /s/ ABE FORTAS
1229 19th Street, N. W.
Washington, D. C.

Attorneys for Defendant.

Dated: November 28, 1955

[Tab No. 87]

Motion for disclosure of grand jury transcripts filed by The Association of American Soap and Glycerine Producers, Inc.

The defendant, The Association of American Soap and Glycerine Producers, Inc. (hereinafter called "the Association"), respectfully moves the Court, pursuant to the discovery provisions of the Federal Rules of Civil Procedure and in accordance with the power of this Court to act in the interest of justice with respect to litigation pending before it, for an order granting leave to the Association and its counsel to inspect and copy the following documents or papers which the Association believes to be either in the possession or control of plaintiff and its counsel or are otherwise within the control of this Court:

The transcripts of the testimony of all witnesses taken before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark from May 1951 to November 1952 in an investigation of possible anti-trust law violations in the soap and synthetic detergent industry.

If the Court should be of the opinion that the entire transcript of testimony before the Grand Jury, together with the exhibits introduced in evidence, should not be made available to the defendant Association, then the Association prays for an order permitting it and counsel to inspect the testimony and pertinent exhibits before the Grand Jury of such witnesses as will give their consent to the defendant Association's seeing and examining their testimony.

In support of this motion, the Association shows to the Court:

(a) The transcripts of testimony before the Grand Jury as above set forth contained testimony taken in connection with an investigation to determine whether there were violations of the anti-trust laws by the Association and other members of the soap and synthetic detergent industry.

(b) The Association asserts, on information and belief, that said transcripts and exhibits obtained by Grand Jury

subpoena have been available to and used by the plaintiff in preparation for the instant civil action.

(c) The plaintiff has been permitted to retain and use in the preparation of the instant case documents and information of the Association produced in the Grand Jury proceedings. On information and belief, the Association asserts that the plaintiff has also been permitted to retain and use in the instant case all other documents and information produced in the Grand Jury proceedings.

(d) On the other hand, the Association has not had access to the Grand Jury transcripts or to other information produced before the Grand Jury.

(e) The said Grand Jury was discharged on November 25, 1952, without returning an indictment against the Association or the other defendants in this action and there is no pending criminal proceeding involving the evidence produced before the Grand Jury. The Association believes that the names of most, if not all, of the witnesses who appeared and testified before the said Grand Jury have been known for some time. It is believed that many, if not all, of the witnesses would have no objection to disclosure of their testimony.

(f) It is of the utmost importance to the Association that the information contained in the Grand Jury transcript be made available to it for the preparation of its defense in the instant case and that the testimony of many, if not all, of the witnesses before the Grand Jury as well as the documents introduced in evidence are relevant to the matters alleged in the complaint in the instant case. The relevancy of such transcripts in the instant case is supported by the fact that the plaintiff sought and obtained from the Association in this case the same records of the Association which were produced by it before the said Grand Jury.

Motion for disclosure of grand jury transcripts filed by The Association of American Soap and Glycerine Producers, Inc.

(g) The Association believes that many matters pertinent to its defense in the instant case will never become known to it unless access to the Grand Jury transcripts is granted by this Court. Under the circumstances, as related herein, denial of such access would be unjust, discriminatory and prejudicial to the Association in the instant case and would be violative of the spirit of the applicable statutes and rules and would deprive the Association of due process and equal protection of the laws and would be, therefore, violative of Amendment V of the Constitution of the United States.

Dated November 25, 1955.

McCarter, English & Studer,
Attorneys of Defendant The Association of American Soap and Glycerine Producers, Inc.,
11 Commerce Street,
Newark 2, New Jersey.

By /s/ Augustus C. Studer, Jr.,
A Member of the Firm.

Of Counsel

Davies, Richberg, Tydings, Beebe & Landa,
1000 Vermont Avenue, N. W.,
Washington 5, D. C.

By /s/ James T. Welch,
A Member of the Firm.

[Tab No. 84]

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on July 23, 1956.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, *vs.* THE PROCTER & GAMBLE COMPANY, *et al.*	Civil Action No. 1196-52

Newark, New Jersey,
July 23, 1956.

Before The Honorable ALFRED E. MODARELLI, U. S. D. J.

APPEARANCES:

HERMAN SCOTT,
U. S. Attorney, District of New Jersey,

By: GEORGE J. ROSSI,
Assistant U. S. Attorney;

JOSEPH E. McDOWELL, and
RAYMOND M. CARLSON,

Attorneys, Department of Justice,
Attorneys for the Plaintiff.

TONER, CROWLEY, WOELPER & VANDERBILT,
Attorneys for defendant Procter & Gamble Company,

By: MARSHALL CROWLEY;

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY,
of Counsel,

By: KENNETH C. ROYALL and
H. ALLEN LOCHNER;

DINSMORE, SHOHL, SAWYER & DINSMORE,
of Counsel,

By: RICHARD W. BARRETT.

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on July 23, 1956.

O'Mara, Schumann, Davis & Lynch,
Attorneys for defendant Colgate-Palmolive-Peet Company;

Cahill, Gordon, Reindel & Ohl,
of Counsel,

By: Mathias F. Correa, and
James Henry.

(2) Bailey, Schenck & Bennett,
Attorneys for defendant Lever Brothers Company,

By: Alexander T. Schenck;

Arnold, Fortas & Porter,
of Counsel,

By: William L. McGovern.

McCarter, English & Studer,
Attorneys for the Association,

By: Augustus C. Studer, Jr.;

Davies, Richberg, Tydings, Beebe & Landa,
of Counsel,

By: Adrien F. Busick.

Mr. Correa: If your Honor please, we have an order on the Colgate discovery motion which your Honor decided and then heard on reargument, and has subsequently decided on reargument.

The order is in form agreed to by the Government and, naturally, by ourselves. And we respectfully submit that.

(Document handed to the Court.)

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on July 23, 1956.

The Court: Do you mind if I just take a look at this?

Mr. McGovern: Your Honor, I think that they are all substantially the same in form.

Mr. Fortas, of our firm, is out of the country and has been since the date of your Honor's decision. I have one, in similar form, consented to by the (3) Government, on behalf of Lever Brothers Company.

(Document handed to the Court.)

Mr. Royall: Your Honor, we have a form, also submitted to the Government, and approved as to form by the Government, and signed by counsel for all parties.

(Document handed to the Court.)

Mr. Busick: On behalf of the Association, your Honor, we present an order, the form of which has been approved by the Department.

(Document handed to the Court.)

The Court: Are there any more to be submitted?

Mr. Correa: I think that is the lot, if your Honor please.

The Court: Mr. McDowell, would you like to be heard?

Mr. McDowell: May it please the Court, at the same time that the Attorney General instructed me to sign the consent of the Government to the form of this order he also instructed me to ask that the orders be presented in open court so that I might state the position of the Government with respect to this order and the subject.

The Court: You may do so.

Mr. McDowell: I am instructed, your Honor, by (4) the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered.

The Court: You heard what Mr. McDowell said?

Mr. Correa: Yes, if your Honor please, I heard what Mr. McDowell has said. Now, the order in the form submitted to your Honor provides that the Government shall make production within thirty days from the entry of the order. I take it that that means, as a practical matter, that we shall have to wait till the expiration of that time to find out whether the Government adheres to the position which has been enunciated here this morning or not. If they do adhere to that position then, I take it, we shall have to take such further steps under the rules as we may be advised.

Mr. Royall: That is our position, also, your Honor.

Mr. McGovern: And Lever Brothers adheres to that position, also, your Honor, plus the fact, as I stated, that Mr. Fortas is out of the country and we have had no opportunity to consult about the position the Government has taken.

Mr. Busick: I take the same position, your (5) Honor.

The Court: Now, the provisions of all the orders are substantially the same.

Mr. Correa: They are identical in form.

Mr. Royall: Yes.

The Court: Identical in form. All provide for thirty days.

Mr. Royall: Yes, sir.

Mr. Correa: Yes, your Honor.

The Court: I am not surprised that the Attorney General feels that way about it. I don't suppose your adversaries are, either.

Mr. McDowell: May I say, your Honor, with respect to the thirty-day matter, we agreed to the inclusion of the provision for thirty days at the request of the defendants, but that it makes no difference to the position of the Government. I was instructed to state that the Government will respectfully decline to produce them.

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on July 23, 1956.

The Court: Obviously, I welcome any test you wish to make of this decision, Mr. McDowell, you and the Attorney General.

You wish to file them today, gentlemen?

Mr. Correa: If your Honor please, sir.

The Court: Nothing further to be done now?

(6) Mr. Royall: No, sir.

The Court: We will wait for thirty days, is that right?

Mr. Correa: Yes, if your Honor please.

The Court: At which time you shall take such action as you deem necessary under the circumstances.

Mr. Correa: That is correct, your Honor.

[Tab No. 118]

Order for disclosure of grand jury transcripts to The Procter & Gamble Company.

The defendant, The Procter & Gamble Company (hereinafter called "Procter"), having filed a motion herein on September 24, 1954, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956; and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion, filed July 9, 1956,

Now, therefore, it is

ORDERED, that the motion and Claim of Privilege of plaintiff be and they hereby are denied; and it is further

ORDERED, that the motion of Procter be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Procter or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of

the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23rd, 1956.

/s/ ALFRED E. MODARELLI,
U. S. D. J.

The form of the foregoing order is hereby consented to:

/s/ JOSEPH E. McDOWELL
Trial Attorney, Department of Justice

TONER, CROWLEY, WOELPER & VANDERBILT

By /s/ MARSHALL CROWLEY
810 Broad Street, Newark, N. J.

/s/ RICHARD W. BARRETT per KCR
Richard W. Barrett

DINSMORE, SHOHL, SAWYER & DINSMORE

/s/ KENNETH C. ROYALL
Kenneth C. Royall

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY
Attorneys for Defendant,
THE PROCTER & GAMBLE COMPANY

[Tab No. 104]

Order for disclosure of grand jury transcripts to Colgate-Palmolive Company.

The defendant, Colgate-Palmolive Company (hereinafter called "Colgate"), having filed a motion herein on November 28, 1955, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the grand jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 in so far as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956; and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion, filed July 9, 1956,

Now, therefore, it is

ORDERED, that the motion and Claim of Privilege of plaintiff be and they hereby are denied; and it is further

ORDERED, that the motion of Colgate be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Colgate or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible viola-

tions of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23d, 1956.

/s/ ALFRED E. MODARELLI,
U. S. D. J.

The form of the foregoing order is hereby consented to:

/s/ JOSEPH E. McDOWELL,
Trial Attorney, Department of Justice.

O'MARA, SCHUMANN, DAVIS & LYNCH,

By /s/ EDWARD J. O'MARA,
A member of said firm,
No. 1 Exchange Place,
Jersey City 2, New Jersey.

CAHILL, GORDON, REINDEL & OHL,

By /s/ MATHIAS F. CORREA,
A member of said firm,
63 Wall Street,
New York 5, New York,
Attorneys for Defendant,
Colgate-Palmolive Company.

[Tab No. 105]

Order for disclosure of grand jury transcripts to Lever Brothers Company.

The defendant, LEVER BROTHERS COMPANY (hereinafter called "Lever"), having filed a motion herein on November 28, 1955, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 insofar as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956; and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion filed July 9, 1956,

Now, therefore, it is

ORDERED that the motion and Claim of Privilege of plaintiff be and they are hereby denied; and it is further

ORDERED that the motion of Lever be and it is hereby granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit Lever or its counsel to inspect and copy, by photostating or other means, all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of possible violations of

the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23d, 1956.

/s/ ALFRED E. MODARELLI,
U. S. D. J.

The form of the foregoing order is hereby consented to:

/s/ JOSEPH E. MCDOWELL, Attorney,
Department of Justice.

[Tab No. 107]

Order for disclosure of grand jury transcripts to The Association of American Soap and Glycerine Producers, Inc.

The defendant, The Association of American Soap and Glycerine Producers, Inc. (hereinafter called the association), having filed a motion herein on November 25, 1955, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952 insofar as such testimony related to the investigation of possible antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion, filed April 17, 1956, and the plaintiff having filed a motion herein dated April 30, 1956, for reconsideration of this Court's ruling on defendant's motions to inspect the Grand Jury transcripts and for ruling on plaintiff's Claim of Privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motion and Claim of Privilege, and having rendered its opinion filed July 9, 1956,

Now, therefore, it is

ORDERED, that the motion and Claim of Privilege of plaintiff be and they hereby are denied; and it is further

ORDERED, that the motion of the association be and it hereby is granted, and that plaintiff, within thirty (30) days from the entry of this order, produce at the offices of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permit the association or its counsel to inspect and copy, by photostating or other means, all or any parts of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury sitting in Newark, New Jersey, from May 1951 through November 25, 1952, in connection with an investigation of

possible violations of the antitrust laws of the United States in the soap and synthetic detergent industry.

Dated: July 23, 1956.

/s/ ALFRED E. MODARELLI,
U. S. D. J.

The form of the foregoing order is hereby consented to:

/s/ JOSEPH E. MCDOWELL,
Trial Attorney, Department of Justice.

MCCARTER, ENGLISH & STUDER,

/s/ By AUGUSTUS C. STUDER, JR.,
11 Commerce Street,
Newark 2, New Jersey.

DAVIES, RICHBERG, TYDINGS & LANDA,

/s/ By ADRIEN F. BUSICK,
ADRIEN F. BUSICK

/s/ JAMES T. WELCH,
JAMES T. WELCH
1000 Vermont Avenue, N. W.,
Washington 5, D. C.
Attorneys for Defendant,
The Association of American Soap & Glycerine Producers, Inc.

[Tab No. 106]

Motion to amend or, alternatively, to stay Order of July 24, 1956.

Plaintiff moves the Court to enter an amended order, in the form attached hereto, in substitution for the orders entered in the above-entitled action on July 24, 1956 by the Honorable Alfred E. Modarelli, directing the plaintiff within 30 days to make available to the defendants the transcripts of testimony of all witnesses who appeared before a certain grand jury. Alternatively, plaintiff moves the Court to stay the said orders of July 24, 1956, pending the filing of appeals therefrom to the Supreme Court of the United States and or the filing of an application with that Court for an extraordinary writ, and the final determination by that Court of said appeal and or application. The reasons for the motion are set forth in the attached affidavit of Herbert Brownell, Jr., the Attorney General of the United States.

/s/ VICTOR R. HANSEN,
VICTOR R. HANSEN,
Assistant Attorney General

/s/ JOSEPH E. McDOWELL,
JOSEPH E. McDOWELL,
Attorney, Department of Justice

(Notice of motion dated August 15, 1956)

[Tab No. 109]

Proposed form of order amending orders for disclosure of grand jury transcripts attached to motion to amend or stay.

The Procter & Gamble Company, Colgate-Palmolive Company, Lever Brothers Company and the Associated Soap and Glycerine Producers, Inc., having filed motions herein on September 24, 1954, November 28, November 28, and November 25, 1955, respectively, for an order granting leave to inspect and copy transcripts of the testimony of all witnesses before the Grand Jury of the United States District Court for the District of New Jersey, sitting in Newark, New Jersey, from May 1951 to November 1952, insofar as such testimony related to the investigation of antitrust law violations in the soap and synthetic detergent industry; and the Court having heard and considered arguments and briefs of counsel, and having rendered its opinion filed April 17, 1956, holding that the defendants are entitled to inspect and copy said transcripts of the aforesaid testimony of witnesses before the Grand Jury; and the plaintiff having filed a motion herein dated April 30, 1956 for reconsideration of this Court's ruling on defendants' motions to inspect the Grand Jury transcripts and for a ruling on plaintiff's claim of privilege; and the Court having heard and considered arguments and briefs of counsel on plaintiff's said motions and claim of privilege, and having rendered its opinion, filed July 9, 1956,

Now, therefore, it is

ORDERED that the motion and claim of privilege of plaintiff be and they are hereby denied; and it is further

ORDERED that unless the plaintiff on or before August 24, 1956 produces at the office of the Department of Justice, Washington, D. C., or such other place as the parties may agree, and permits each of the defendants or their counsel to inspect and copy, by photostating or other means, all or any part of the aforesaid transcripts of the testimony

Proposed form of order amending orders for disclosure of grand jury transcripts attached to motion to amend or stay.

of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein.

/s/ ALFRED E. MODARELLI*
United States District Judge.

Dated: August 21,* 1956.

* The Court signed and dated the proposed form of order attached to the motion to amend or stay.

[Tab No. 109]

Affidavit in support of motion to amend or stay sworn to by Herbert Brownell, Jr.

DISTRICT OF COLUMBIA, SS:

HERBERT BROWNELL, JR., being duly sworn, deposes and says:

I am the Attorney General of the United States and, as such, the chief law enforcement officer of the United States.

I am of the opinion that the order of the Court directing the plaintiff to make available to the defendants the grand jury transcripts is erroneous and that making such transcripts public would be contrary to the best interests of the administration of justice. It is my intention to seek review of that ruling in the Supreme Court of the United States.

The order of the Honorable Alfred E. Modarelli requires the Government to make the transcripts available to the defendants by August 24, 1956. In my considered judgment, it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order.

Under these circumstances, I believe that amendment of the orders as proposed in the within motion clearly would be in the public interest. However, if the Court concludes that such revision is not appropriate, I then urge that the orders be stayed until the United States has had an opportunity to file an appeal therefrom to the Supreme Court of the United States and/or to file with that Court

Affidavit in support of motion to amend or stay sworn to by Herbert Brownell, Jr.

an application for an extraordinary writ, and until that Court finally has determined said appeal and/or application.

/s/ HERBERT BROWNELL, JR.

HERBERT BROWNELL, JR.
Attorney General.

Sworn to before me this
14th day of August, 1956.

/s/ WM. C. JACKSON
My Commission
Expires 4/14/60

[Tab No. 109]

Brief in support of motion to amend or stay.

Statement.

From May 1951 until November 25, 1952 a Grand Jury sitting in this district investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. No indictment was returned, but on December 11, 1952 the United States filed a civil complaint charging that since 1926 the defendants have been engaged in a conspiracy in unreasonable restraint of, and to monopolize, trade and commerce in the production and sale of soap and synthetic detergents, and that the three manufacturing defendants have monopolized that trade, in violation of Sections 1 and 2 of the Sherman Act.

In the fall of 1955 each of the defendants filed a motion for an order granting leave to inspect and copy the transcript of testimony taken of all witnesses who appeared before the Grand Jury. That transcript is in the custody of the Attorney General. After argument, the District Court (*per* Judge Modarelli) held, in an opinion issued on April 17, 1956, that the defendants were entitled to inspect and copy the Grand Jury transcripts.

On May 3, 1956 the Government moved for reconsideration of that ruling. At the same time, it submitted a claim by the Attorney General that the Grand Jury transcripts ordered to be made available to the defendants were privileged against disclosure. On July 9, 1956 the Court issued an opinion denying the plaintiff's motion for reconsideration.

On July 24 the Court entered the order (dated July 23) which is the subject of the instant motion. That order directed the plaintiff to produce within 30 days at the offices of the Department of Justice, or at such other places as the parties may agree, and to permit each of the defendants or its counsel to inspect and copy, "all or any part of the transcripts of the testimony of all witnesses who appeared before the said Grand Jury * * *."

ARGUMENT.

Judge Modarelli's order requires the United States to make the Grand Jury transcripts available to the defendants by August 24, 1956. The Attorney General is of the view that that order is erroneous and further that making such transcripts public would be contrary to the public interest in the administration of justice (see his affidavit attached to motion). He has therefore decided to seek review of Judge Modarelli's ruling in the Supreme Court of the United States.

However, Supreme Court review obviously cannot be had by August 24, 1956, the date fixed for compliance in Judge Modarelli's order. We believe that it would be unseemly for the Attorney General, as the chief law enforcement officer of the United States, to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order in order to obtain effective appellate review thereof. Under these circumstances, we urge the Court to enter an amended order which provides that if the transcripts are not made available by August 24 (the date previously fixed by the Court), an order will be entered dismissing the complaint. Such an amendment of the order of July 24 would in no way prejudice the defendants, and it would avoid placing the Attorney General of the United States in the dilemma above noted. If such an amended order is entered, the United States intends to appeal from the subsequent judgment of dismissal, as was done in *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 94 (judgment of dismissal affirmed by an equally divided court).[1]

---

[1] Cf. *United States* v. *Zucca*, 351 U. S. 91, where the district court entered an order dismissing the Government's complaint in a denaturalization proceeding for failure to file an affidavit of good

However, if the Court should conclude that the order should not be thus amended, we request the Court to stay the order pending the filing of an appeal therefrom to the Supreme Court of the United States and/or the filing with that Court of an application for an extraordinary writ, and final decision by the Supreme Court on such appeal and/or application. Such a stay would not prejudice the defendants, and would similarly avoid placing the Attorney General in the position of having to disobey an outstanding court order as a condition of testing its validity.

Respectfully submitted,

/s/ VICTOR R. HANSEN,
Assistant Attorney General

/s/ JOSEPH E. MCDOWELL,

/s/ DANIEL M. FRIEDMAN,
Attorneys, Department of Justice.

---

cause, on condition that if within 60 days the Government filed such affidavit, the complaint would be reinstated. The Government did not file the affidavit, and the court then entered a final order of dismissal. Record on appeal, *United States* v. *Zucca*, No. 213, October Term 1955, pp. 20, 22.

[Tab No. 109]

Answer to motion to amend or stay filed by The Procter & Gamble Company.

The defendant, The Procter & Gamble Company (hereinafter designated as "Procter"), answers plaintiff's motion of August 16, 1956, as follows:

As to the first request in plaintiff's instant motion, Procter says that the order herein dated July 23, 1956, is a proper and sufficient order at this stage of the proceedings. However, without waiving this position, Procter further states that the plaintiff's proposed relief of production or dismissal does not seem to be relief which Procter could in any way oppose.

This makes unnecessary a discussion of the alternative order proposed in plaintiff's motion, which alternative, if it had come before the Court for consideration, Procter would oppose.

Dated: August 21, 1856.

Respectfully submitted,

TONER, CROWLEY, WOELPER & VANDERBILT,
By /s/ JOHN A. ACKERMAN,
per H.A.L.
810 Broad Street,
Newark, New Jersey.

/s/ RICHARD W. BARRETT,
RICHARD W. BARRETT
DINSMORE, SHOHL, SAWYER & DINSMORE,
12th floor, Union Central Building,
Cincinnati 2, Ohio.

/s/ KENNETH C. ROYALL,
KENNETH C. ROYALL
DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY,
100 Broadway,
New York 5, N. Y.
Attorneys for Defendant,
The Procter & Gamble Company

[Tab No. 111]

Transcript of Hearing Before the Honorable Alfred E. Modarelli, U. S. D. J. on August 21, 1956.

Appearances:

HERMAN SCOTT, U. S. Attorney, District of New Jersey, By: GEORGE J. ROSSI, Assistant U. S. Attorney;

JOSEPH E. McDOWELL, and DANIEL M. FRIEDMAN, Attorneys, Department of Justice, Attorneys for the Plaintiff.

TONER, CROWLEY, WOELPER & VANDERBILT, Attorneys for defendant Procter & Gamble Company, By: JOHN A. ACKERMAN;

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, Of Counsel, By: KENNETH C. ROYALL, FREDERICK W. R. PRIDE, and H. ALLEN LOCHNER;

DINSMORE, SHOHL, SAWYER & DINSMORE, Of Counsel, By: RICHARD W. BARRETT.

O'MARA, SCHUMANN, DAVIS & LYNCH, Attorneys for defendant Colgate-Palmolive Peet Company;

(2) CAHILL, GORDON, REINDEL & OHL, Of Counsel. By: MATHIAS F. CORREA.

BAILEY, SCHENCK & BENNETT, Attorneys for defendant Lever Brothers Company, By: ALEXANDER T. SCHENCK; ARNOLD, FORTAS & PORTER, Of Counsel, By: ABE FORTAS.

McCARTER, ENGLISH & STUDER, Attorneys for the Association;

DAVIES, RICHBERG, TYDINGS, BEEBE & LANDA, of Counsel, By: JAMES T. WELCH.

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on August 21, 1956.

The Court: No. 10, United States of America *vs.* Procter & Gamble, and others, hearing on plaintiff's motion to amend or stay the order of July 24, 1956, heretofore entered by this Court. Are we ready on that?

Mr. McDowell: The plaintiff is ready, your Honor.

Mr. Correa: The defendants are ready, your Honor.

Mr. Royall: Ready.

Mr. Rossi: I respectfully move the admission of Mr. Daniel Friedman, attorney for Department of Justice, Antitrust Division. He is admitted to practice in New York State and before the United States Supreme Court.

The Court: I am very pleased to admit Mr. (3) Friedman for the purpose of this motion.

Mr. Friedman: Thank you, your Honor.

The Court: Go ahead, Mr. McDowell.

Mr. McDowell: Your Honor, our motion this morning seeks to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes.

Because this matter does involve essentially this question of putting the matter in proper posture for appeal, I would like, with your Honor's indulgence, to ask Mr. Friedman, who is from the appellate section of the Department, to present the matter to the Court. I will, of course, be prepared to answer any questions your Honor may wish to address to me.

The Court: All right, Mr. Friedman, we will hear you from the appellate section.

Mr. Friedman: May it please your Honor, the order which your Honor entered in this matter on the 24th of July directed the United States to make available to the defendants within thirty days the grand jury transcripts. This order by its terms places the Attorney General in a very difficult dilemma, because he has a number of alternatives and we think that each of these alternatives would involve a serious violation of an important public interest

which the (4) Attorney General thinks he should carry out. And we are therefore coming before your Honor to suggest that the order be amended in a way to eliminate these possibilities. And, alternatively, if your Honor does not see fit to amend the order we are asking for a stay of the order pending the taking of necessary appellate review in the Supreme Court.

The amendment which we are proposing to your Honor is that instead of the order directing us within thirty days to make the grand jury transcripts available that the order recite that in the event the United States does not make the grand jury transcripts available within thirty days the Court will then enter an order of dismissal.

The Attorney General has a great deal of respect for the orders of this Court and he feels that it is not in the public interest that in order to test the validity of your Honor's ruling with reference to the production of the grand jury transcripts he should be put in the position that he has to disobey an outstanding order of the Court in order to seek review of that order.

If, on the one hand, he is to comply with your Honor's order and make the transcripts available, from the appellate point of view that would moot the matter, (5) because once the secrecy of the grand jury transcript has been breached the whole issue becomes moot. Moreover, it would require him to turn over the grand jury transcripts and thus dissipate and destroy the secrecy which he believes the public interest requires to be maintained.

On the other hand, if he does nothing and just remains until after the 30th day and does not comply, he is then put in the position that he stands before the bar of public opinion that he has disobeyed a valid and outstanding order of this Court which is within the Court's power to exercise.

We have already indicated that the Attorney General respectfully disagrees with your Honor's order and we think that he thinks that it is his obligation to test this

order before the Supreme Court. But he does not think—and he very strongly is of this view—that the Executive Department of the Government in order to test the order of the Court should have to disobey it. We think that is an unseemly position. And we want to make it very clear that in requesting this amendment of the order we are not in any way waiving any rights to challenge the substance of the ruling on appeal. We are merely trying to change the form of the order, to put it in terms that we can get effective appellate review of the order without being in the position of (6) having to disobey the order as a condition to testing it.

We think there is no question but that this Court has the power to enter such an order. I don't seriously think it can be suggested that the Court could not amend the order in those terms.

Very briefly, in the event that your Honor declines to amend the order, we then suggest that the status quo should be preserved pending an appeal from the order, or, alternatively,—we haven't, frankly, decided which we are going to do, or both; it is a very difficult question—the filing of an application for an extraordinary writ. And we therefore ask if your Honor does not amend the order that he should stay the order until such time as we have had the application filed and the Supreme Court has disposed of it.

Now, I don't know, frankly, what objections, if any, our adversaries are going to make. And I respectfully suggest that we might hear from them and then we will be prepared to answer their objections.

The Court: Thank you, Mr. Friedman.

Mr. Friedman: Thank you, your Honor.

The Court: General Royall.

Mr. Royall: Your Honor, the defendant Procter & Gamble Company, The Procter & Gamble Company, which we (7) designate here as Procter, answers the argument made here today as follows:

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on August 21, 1956.

As to the first request, primary request, in the plaintiff's motion, Procter says that the order herein dated July 23, 1956, is a proper and sufficient order at this stage of the proceedings.

However, without waiving this position Procter further states that the plaintiff's proposed relief of production or dismissal does not seem to be a relief which Procter could in any manner oppose.

This makes unnecessary a discussion of the alternate order proposed in the motion, which alternative, if it comes before the Court for consideration, Procter would oppose.

The Court: You understand, Mr. Friedman?

Mr. Friedman: Yes, I understand they are not objecting to the amended order.

Mr. Royall: We are not objecting to the relief, yes, your Honor.

The Court: Mr. Fortas.

Mr. Fortas: If your Honor please, our position is approximately the same, that is to say, we think the Government should have produced the documents. We don't believe that the Government is entitled to any special position in litigation. We understand that to (8) be the rule of law in this country. And the Government has come in here and moved for a dismissal of the case in the event that the documents are not produced and we don't see how we can object to that on behalf of the Lever Brothers Company.

Mr. Correa: That, if your Honor please, states substantially the position of the Colgate-Palmolive Company, which likewise wishes to insist upon production of the papers required by your Honor's order, in the manner specified in your Honor's order. But equally, as stated by Mr. Fortas, we do not see how we can oppose the Government's motion, as we understand it.

Mr. Welch: Your Honor, on behalf of the Association, I would like to adopt the views expressed by counsel for the respondents.

Transcript of hearing before the Honorable Alfred E. Modarelli, U. S. D. J. on August 21, 1956.

The Court: Well, it looks like we are all in agreement. I certainly have no objection. You will submit an order in conformity with the opinions expressed by all counsel and I will sign it.

Mr. McDowell: Thank you, your Honor. I believe there is a draft of the order before the Court with our motion papers.

The Court: Have you gentlemen read the proposed order which Mr. McDowell has prepared?

Mr. Royall: Yes, sir; Procter did and I assume (9) the others did.

Mr. Correa: We have.

Mr. Royall: My statement was made on the basis of the order attached to the plaintiff's motion.

The Court: All right, gentlemen, the order will be signed since there is no objection to it.

Mr. Correa: May we have a moment, if your Honor please?

The Court: Yes, sir.

(Counsel confer.)

Mr. Correa: There is nothing of substance, if your Honor please, except that— Is it proposed that the order in exactly this form be signed? I think technically it is an amended order, isn't it?

The Court: Yes, I imagine it is an amended order. You mean the title of it?

Mr. Correa: Yes, sir.

The Court: You have no objection to putting "Amended Order" there, have you?

Mr. Friedman: Certainly not, your Honor.

The Court: All right. My secretary isn't here so you will have to have someone in the United States Attorney's office type it, or Mr. McDowell write it in, or someone else.

Mr. Royall: Your Honor, I read a statement and (10) we have it in the form of an answer which states our entire

position. I would like to file it so it will be a matter of record and give a copy to the Government.

The Court: Does anybody else wish to file any?

Mr. Fortas: No, your Honor. On behalf of Lever, I would like to subscribe to the written statement filed by Procter.

Mr. Correa: And on behalf of Colgate I should like this record to stand as a record of our position on the Government's motion to amend its order.

Mr. Welch: That is also so for the Association.

The Court: That makes it unanimous.

Nothing further now and we will recess then to await the pleasure of the Naturalization Bureau when they are ready for the candidates for citizenship.

[Tab No. 119]

Letter of the Honorable Alfred E. Modarelli, U. S. D. J. to counsel.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Newark 1, N. J.
September 6, 1956

HONORABLE HERMAN SCOTT
United States Attorney
Newark 1, New Jersey

HONORABLE JOSEPH E. McDOWELL
Antitrust Division
Department of Justice
Washington, D. C.

Messrs. ARNOLD, FORTAS & PORTER
1229 Nineteenth Street, N.W.
Washington 6, D. C.

Messrs. BAILEY, SCHENCK & BENNETT
744 Broad Street
Newark, New Jersey

Messrs. CAHILL, GORDON, REINDEL & OHL
63 Wall Street
New York 5, New York

Messrs. O'MARA, SCHUMANN, DAVIS & LYNCH
1 Exchange Place
Jersey City, New Jersey

Messrs. DAVIES, RICHBERG, TYDINGS, BEEBE & LANDA
1000 Vermont Avenue, N.W.
Washington 5, D. C.

Messrs. McCARTER, ENGLISH & STUDER
11 Commerce Street
Newark, New Jersey

Letter of the Honorable Alfred E. Modarelli, U. S. D. J. to counsel.

Messrs. Dwight, Royall, Harris, Koegel & Caskey
100 Broadway
New York, New York

Messrs. Dinsmore, Shohl, Sawyer & Dinsmore
Union Central Building
Cincinnati, Ohio

Messrs. Toner, Crowley, Woelper & Vanderbilt
810 Broad Street
Newark, New Jersey

Re: *United States* v. *The Procter & Gamble Co., et al.* Civil No. 1196-52.

Gentlemen:

Reference is made to the amended order dated and filed in the above-entitled cause on August 21st last. The only purpose of this letter is to find out whether the plaintiff has produced as directed in the last paragraph of the amended order. Your early attention to this inquiry will be appreciated.

If the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order.

Very truly yours,

Alfred E. Modarelli.

AEM:cmo

[Tab No. 128]

Letter to the Honorable Alfred E. Modarelli, U. S. D. J. from Victor R. Hansen, Assistant Attorney General, Antitrust Division.

September 7, 1956

Honorable ALFRED E. MODARELLI
United States District Judge
District of New Jersey
Newark 1, New Jersey.

Re: United States v. *The Procter & Gamble Company, et al.—Civil Action No. 1196-52*

My dear Judge Modarelli:

I have Your Honor's letter addressed on September 6, 1956 to counsel in the above-entitled cause. In response to your inquiry I must respectfully state that plaintiff has not produced the grand jury transcripts for inspection by the defendants.

Sincerely yours,

/s/ VICTOR R. HANSEN

VICTOR R. HANSEN
Assistant Attorney General
Antitrust Division

[Tab No. 129]

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 51

UNITED STATES OF AMERICA, *Appellant*,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

MOTION OF APPELLEE LEVER BROTHERS COMPANY TO DISMISS OR AFFIRM

ABE FORTAS
1229 19th St., N. W.
Washington 6, D. C.
Attorney for Appellee
Lever Brothers Company

Of Counsel:

CHARLES A. REICH
ARNOLD, FORTAS & PORTER
1229 19th St., N. W.
Washington 6, D. C.

January 3, 1957

INDEX

	Page
Statement	2
1. The Appeal	2
2. The Background	3
3. The Relevant Proceedings and Orders	3
The Issue and Its Implications	9
1. The Issue	9
2. The Appellant's Misstatement of the Issue	10
3. Implications of the Jurisdictional Issue	11
Argument	16
I. The District Court's Order of Dismissal Is Not Appealable Because It Is Not a Final Determination of the Controversy	17
II. Even if the Dismissal Order Possessed the Requisite Finality, It Is Not Appealable Because It Was Invited, Procured and Obtained by the Appellant	21
III. No Necessity Exists for Review of the Interlocutory Order at This Time	23
Conclusion	27

TABLE OF CITATIONS

CASES:

Alexander v. United States, 201 U. S. 117	16
Apex Hosiery Co. v. Leader, 102 F. 2d 702 (3rd Cir. 1939)	16
Ballott v. United States, 171 Fed. 404 (1st Cir. 1909)	23
Bank Line v. United States, 163 F. 2d 133, 137-138 (2d Cir. 1947)	14
Bankers Life & Casualty Co. v. Holland, 346 U. S. 379	14
Bowman Dairy Co. v. United States, 341 U. S. 214	13

Page

Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24 22
Cobbledick v. United States, 309 U. S. 323, 325-26 ..17, 18
Cogen v. United States, 278 U. S. 221 16
Cybur Lumber Co. v. Erkhart, 247 Fed. 284, 285 (5th Cir. 1918) 22
Evans v. Phillips, 4 Wheat. 73 22
Francisco v. Chicago & A. R. Co., 149 Fed. 354 (8th Cir. 1906) 21
R. D. Goldberg Theatre Corp. v. Tri-States Theatre Corp., 119 F. Supp. 521 (D.C.D. Neb. 1944) 17
Herzog v. United States, 75 S. Ct. 349 24
International Carrier Call & Television Corporation v. Radio Corporation of America, 142 F. 2d 493 (2d Cir. 1944) 23
Kelly v. Great Atlantic & Pacific Tea Co., 86 F. 2d 296 (4th Cir. 1936) 18, 22
Marks v. Leo Feist, 8 F. 2d 460 (2d Cir. 1925) 22
Pacific Railroad Company of Missouri v. Ketchum, 101 U. S. 289 23
Parr v. United States, 351 U. S. 513 .....15, 18
St. Louis, I. M. & S. Ry. Co. v. Southern Express Co., 108 U. S. 24, 28 19
Segurola v. United States, 275 U. S. 106, 112 19
Swift & Co. v. United States, 276 U. S. 311 23
United States v. Babbitt, 104 U. S. 767 23
United States v. Cotton Valley Operators Committee, 339 U. S. 940 20
United States v. Reynolds, 345 U. S. 1 13
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 24
United States ex rel. Touhy v. Ragen, 340 U. S. 462.. 13
United States v. Wallace & Tiernan Co., 336 U. S. 793 .....18, 19, 20, 22
United States v. Yellow Cab Company, 332 U. S. 218 20
V. O. Machinoimport v. Clark Equipment Co., 12 F.R.D. 191 (D.C.S.D.N.Y. 1951) 18

STATUTES AND RULES:

Revised Rules of the Supreme Court, Rule 16 1
Federal Rules of Civil Procedure, Rule 34 ..... 2, 4
Federal Rules of Civil Procedure, Rule 37 .....7, 21

Page

Federal Rules of Civil Procedure, Rule 41(a) 14
Federal Rules of Civil Procedure, Rule 41(b) 20
Federal Rules of Criminal Procedure, Rule 6 27
28 U.S.C. § 1651 13
Expediting Act of February 11, 1903, Section 2 (32 Stat. 823, 15 U.S.C. § 29, as amended, 62 Stat. 869, 989) 2, 17
Sherman Act, Sections 1 and 2 3

MISCELLANEOUS:

50 Columbia Law Review 1102 (1950) 14
Wigmore, *Evidence* (3d Ed.) §§ 2360, 2361 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 609

UNITED STATES OF AMERICA, *Appellant*,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

---

MOTION OF APPELLEE LEVER BROTHERS COMPANY TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellee, Lever Brothers Company (hereinafter "Lever"), respectfully moves this Court to dismiss this appeal or to affirm the judgment below on the ground that the order is not appealable.

The reasons supporting this motion are as follows: (1) This is an appeal from an order obtained by appellant merely as a device to secure review of a non-appealable interlocutory order of discovery entered under Rule 34 of the Federal Rules of Civil Procedure. It is not a "final order". (2) The order of dismissal was entered on motion of appellant. Appellant invited, procured and consented to the order. Accordingly, appellant is not aggrieved and is estopped to appeal from the order.

The Jurisdictional Statement filed by the appellant does not faithfully set forth the facts relevant to the jurisdictional issue, or correctly state the jurisdictional issue, as we shall discuss hereinafter.

STATEMENT

1. The Appeal

This is an appeal by the United States (plaintiff below) from judgments of the United States District Court for the District of New Jersey, entered on September 13, 1956, dismissing the present action. The appeal purports to be taken pursuant to Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823, 15 U.S.C. § 29, as amended, 62 Stat. 869, 989).

The judgments of dismissal were made pursuant to an order of the District Court entered upon the motion of the appellant itself. (Appellant's Jurisdictional Statement, p. 5 fn. 3). Appellees did not consent to the dismissal, but merely stated that they could not oppose a motion by the United States which would have the effect of dismissing the complaint against them (Appellees' Joint Appendix, 37).

2. The Background

This action was brought by the United States under Sections 1 and 2 of the Sherman Act against Lever and two other companies engaged in the soap and detergent business, and against the trade association for the industry. The complaint was filed on December 11, 1952, about three weeks after the discharge of a grand jury, convened in the District of New Jersey, which had investigated the industry. The grand jury began its proceedings in May, 1951, and was discharged on November 25, 1952. It did not return an indictment. The grand jury was obviously employed by the Department of Justice as an instrument of discovery for civil proceedings, in lieu of the use of the procedures provided by the Federal Rules.[1] The complaint herein was based upon the evidence, both documentary and testimonial, which had been obtained in the grand jury proceedings (Department of Justice Press Release, quoted in Opinion, Jur. St. 15).

The case was still in the pre-trial stage at the time that the court below entered the order which the appellant seeks to have this Court review, namely, directing the appellant to make available to defendants the transcripts of testimony of witnesses before the grand jury. The Department of Justice had extensively used the documents and testimonial evidence obtained by it before the grand jury (see Jur. St. 16-17, 53). Most of the documents which had been before the grand jury, including most of the documents which had been obtained by grand jury subpoenas from persons that were not made defendants in this case, had been made available to the

[1] See Opinion, Jur. St. 14-16.

defendants for inspection and copying (Record, Stipulation for Inspection and Copying by Defendants of Certain Third Person Documents, July 15, 1953).

The documents obtained by the grand jury and the transcript of testimony before the grand jury had been removed to Washington for study by the plaintiff's agents and employees without restriction to those authorized to act in conjunction with the grand jury (Appendix to Opinion, Jur. St. 29-30).

Pursuant to Rule 34, the Department of Justice had also obtained supplemental documents from the defendants, largely to bring up to date the evidence which it had obtained from the grand jury (Opinion, Jur. St. 15). The case rapidly assumed the gargantuan proportions of the usual "Big Case". Judge Modarelli devised procedures for administering the case and assuring full interchange of information prior to trial. These procedures were approved and commended by counsel for the plaintiff and the defendants (Appendix to Opinion, Jur. St. 25).

The discovery order involved in the present appeal was one of the administrative orders of the court, entered pursuant to its discretionary powers under Rule 34 in order that the defendants might have access to relevant information equal to that of the plaintiff and that the duplication and delay which would be involved if the defendants took the oral depositions of the witnesses before the grand jury might be avoided (Opinion, Jur. St. 17; Appendix to Opinion, Jur. St. 24).

3. The Relevant Proceedings and Orders

Each of the appellees filed a motion under Rule 34 for an order granting leave to inspect and copy the

transcripts of testimony—not the entire minutes—of the grand jury proceedings (J.A. 1, 5, 6, 8). The basis of these motions was that the plaintiff-appellant through agents not connected with the grand jury had long had access to and had used those transcripts for purposes of the civil proceeding; that the plaintiff intended to use the testimony in such transcripts at the trial; that there was no reasonable basis for distinguishing between the documentary evidence which had been before the grand jury and the testimony of witnesses before it; that knowledge of the testimonial evidence which was being used by the plaintiff was essential to the defendants in the preparation of their case; that, in Lever's case, not one of the officials of the company who appeared before the grand jury was any longer connected with the company; that the trial of the case would be greatly delayed and the expense thereof greatly increased if defendants were compelled to take the depositions of more than twenty-five witnesses who had testified before the grand jury; and that in any event, the recollection of such witnesses, years after the events and several years after they testified, was not an adequate substitute for their testimony as recorded before the grand jury; and that no reason in law or in fact appeared for denying to defendants access to such testimony.

On April 17, 1956, after elaborate consideration, the court granted these motions in the interests of fairness and of full, mutual discovery and as part of sensible administration of the "Big Case" in order to avoid delay and duplication. The court's order was based on the court's finding that the "plaintiff is using the transcripts"; that "equal use of the transcripts by defendants will give them the fullest possible knowl-

edge of the facts before trial"; and that "none of the reasons for the rule of secrecy applies". (Opinion, Jur. St. 49-50). Accordingly, the court concluded that "the ends of justice" required him to make the transcripts available to the defendants.

On April 30, 1956, the plaintiff-appellant filed a motion for reconsideration, which was argued on June 11, 1956. This was denied in a second opinion of the court, filed on July 9, 1956. Proposed orders were submitted by each of the defendant-appellees and a hearing was held thereon on July 23, 1956.

At this hearing, the appellant's counsel informed the court that the Department of Justice would in no event produce the transcripts called for by the proposed orders. Mr. McDowell, a Department of Justice attorney, stated:

> "MR. MCDOWELL: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered." (J.A. 13).

The court, despite this announcement, entered its order requiring the plaintiff to produce the transcripts of testimony within thirty days. The plaintiff consented to the form of these orders (J.A. 16-22).

The Department, however, did not await the expiration of the thirty day period. It made no effort to ascertain what remedy or penalty would be imposed by the court in the event of non-compliance. It was aware that a motivating factor in the court's decision was "The fact that the plaintiff has used and will continue to use the transcripts" (Opinion, Jur. St. 17). Presumably, it was also aware that the court could have

confined its remedy for non-compliance to an order that the transcripts should not be further used by the plaintiff, and that the court had a wide range of penalties and remedies under Rule 37.

But the Department of Justice did not wish to await this normal development in the trial court, nor did it wish to apply to an appellate court for a writ of mandamus or prohibition. It decided to take matters into its own hands, and to seek immediate review of the production order. Accordingly, on August 16, 1956, prior to the time for compliance with the order of July 23, appellant filed a motion to amend that order.[2] It tendered a form of amended order which provided that

> "unless the plaintiff on or before August 24, 1956 [the date for compliance with the order of July 23] produces . . . the aforesaid transcripts . . . the Court will enter an order dismissing the complaint herein." (J.A. 25-26).

The appellant made it entirely clear that its sole purpose in proposing dismissal of the complaint was to enable it to appeal the production order. Appellant reiterated its previously announced statement that it did not intend to comply with the trial court's order, but it sought—as litigants have often tried to do, with practically universal lack of success—to appeal from the order without either obeying or disobeying it. In its effort to achieve the desired result, the appellant filed an affidavit of the Attorney General himself. The Attorney General's affidavit said:

> ". . . It is my intention to seek review of that ruling in the Supreme Court of the United States."

---

[2] Plaintiff's motion asked in the alternative that, in the event the order was not amended as requested, a stay be granted pending review. This alternative was not pressed. (J. A. 24).

> ". . . In my considered judgment, it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order." (J.A. 27).

This purpose—to obtain appellate review of the discovery order without either obeying or disobeying it—was reiterated by trial counsel for the Department at the hearing on appellant's motion on August 21. Mr. McDowell stated:

> "Your Honor, our motion this morning seeks to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes." (J.A. 34).

Defendants then told the Court that they did not see how they could object if the Government moved for a dismissal of the case against them, although they believed that the order of July 23 was a "sufficient order at this stage of the proceedings"; i.e., prior to compliance or non-compliance by the plaintiff (J.A. 37).

Accordingly, the motion of the plaintiff-appellant was granted. An "Amended Order" was entered on August 21, 1956, in precisely the form requested by the plaintiff, providing that unless the plaintiff produced the transcripts on or before August 24, 1956, the court would dismiss the complaint (J.A. 25-26).

Pursuant to its program of procuring an order of dismissal so that it might obtain appellate review of the discovery order, the plaintiff did not produce the transcripts, and so notified the court by letter. Thereupon, the court on September 13, 1956, entered its orders dismissing the action. This appeal is taken from these orders of dismissal.

THE ISSUE AND ITS IMPLICATIONS

1. The Issue

The jurisdictional issue presented by this appeal is whether a plaintiff may appeal from an order dismissing a complaint, procured by the plaintiff for the purpose of obtaining appellate review of a non-appealable, interlocutory discovery order, where the effect of the dismissal order is merely to "to put [the interlocutory order] in proper posture for review on appeal" (J.A. 34).

It will be noted that the orders of dismissal were *not* imposed by the court as a penalty for non-compliance. The order of July 23 did not provide any penalty for non-compliance. In the event of non-compliance, the court would have had a choice of various remedies or penalties. It might have forbidden the plaintiff to use any of the grand jury transcripts for impeachment of witnesses, or otherwise. It might have cited counsel for contempt, in which event an appeal would lie. The fact, however, is that the court had no opportunity to exercise this choice. The plaintiff-appellant sought and obtained the orders of dismissal, pursuant to a procedure which it carefully devised for the purpose of avoiding either compliance or a moment of default in which the discretion of the

court, rather than the design of the plaintiff, could have been exercised.

The orders were not sought by the defendant-appellees. In the event of non-compliance with the orders to produce, the defendant-appellees might have moved for the entry of various types of orders by way of remedy of penalty. They might, among other things, have merely sought to preclude further use of the transcripts, or they might have sought an order of involuntary dismissal which, if granted, would have had the effect of an adjudication on the merits under Rule 41(b). They did not. They had no occasion to make any such motion.

The orders of dismissal were entirely the result of the choice and initiative of the plaintiff. The plaintiff now seeks to appeal from them. Such an appeal does not lie, as we shall show.

2. The Appellant's Misstatement of the Issue

The plaintiff-appellant is obviously fearful that the fact that it sought and obtained the orders of dismissal presents an insurmountable obstacle to its appeal. It attempts to meet this problem by an inaccurate statement of the issue.

In the "Question Presented", the plaintiff states that "the district court directed the United States, *over its objection and on pain of dismissal of the suit,* to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who had appeared before the grand jury". (Jur. St. 3) (Emphasis supplied).

This statement is inaccurate and misleading. At no time was dismissal of the suit threatened, suggested or

discussed until plaintiff itself filed a motion asking for this relief in order to put the discovery order "in proper posture for review on appeal" (J.A. 24-26, 34).

(a) The initial order for inspection, dated July 23, which was entered over plaintiff's objection, did *not* specify any penalty. It was *not* entered "on pain of dismissal of the suit".

(b) The *amended* order of August 21 was made on plaintiff's motion. The provision for dismissal of the complaint was *not* entered over the objection of the United States. The United States *sought and obtained* such a provision in the order for the purpose of enabling it to file this appeal in circumvention of the usual requirement that a party must obtain an order finally disposing of the issues, or a contempt adjudication, before obtaining appellate review of a discovery order.

In a footnote on page 5 of its Jurisdictional Statement, plaintiff recognizes that these, and not the statement in its "Question Presented", are the facts: that the dismissal was at the plaintiff-appellant's solicitation; that the original order did not state the consequences of non-compliance; that the order was amended upon the Government's motion; and that the Government now is attempting to appeal from a dismissal which is of its own seeking. (Jur. St. 5, fn. 3).

3. Implications of the Jurisdictional Issue

Simply stated, the Department of Justice is here seeking appellate review of an interlocutory order which it has neither obeyed nor disobeyed. In effect, it seeks an advisory opinion, in advance of final judicial action, as to the right of a trial court involved in the

vast detail of an anti-trust case to order that the defendants be allowed to examine the transcripts of the testimony of witnesses before a grand jury.

We do not challenge the bona-fides of the Department's concern about this issue. But the issue, like all others in our judicial system, must be considered at a time and in a context that make it appropriate and feasible for appellate review. It should not be adjudicated *in vacuo*, by passing the judgment that the trial court might exercise in the event of non-compliance and detouring the stream of litigation which washes away so many interlocutory orders which, when entered, appear to the parties to be of surpassing importance.

At no time did the Attorney General's representatives seek to ascertain what remedy or penalty the trial court would adopt to implement its order, to achieve the result which the order was intended to serve, or to penalize non-compliance. At no time did they seek to narrow or condition the trial court's order, or to offer to refrain from using the grand jury transcripts (*Cf.* Jur. St. 13-16). They merely took the position that the order was erroneous, and that it would be "unseemly" for them to comply or to disobey. It was on this extraordinary basis that they devised the present extraordinary procedure by which they hope to obtain appellate review of an admittedly non-appealable order at this preliminary stage of the present anti-trust case.

Various alternatives were available to the Department which would not have involved the difficulties of this appeal or the invitation to this Court to create a precedent which, as we shall discuss, will invite imitation and disrupt established, orderly litigation procedures.

(a) The Department might have complied with the court's direction, and have awaited final judgment in the case to obtain review of the order relating to the grand jury transcripts. *United States* v. *Reynolds,* 345 U.S. 1. No harm would have been done. The grand jury testimony here is about soap and synthetic detergents. It does not involve secret information vital to the security of the nation.

(b) The Department might have disobeyed. Even if the consequences had been a contempt order, there would be nothing "unseemly" about this which is not implicit in the act of non-compliance itself. If there is anything "unseemly"—which we do not believe—it is the Government's decision that it would not comply with the court's order. But that decision was announced in open court on July 23, and the Government's "unseemly" refusal, if such it was, persists to this day. Certainly, contempt orders against the Government and appeals therefrom are not unprecedented. See *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 and *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462.

(c) Alternatively, the Department might have filed an application with this Court under 28 U.S.C. § 1651, for a writ of mandamus or prohibition immediately after entry of the initial order of July 23. If the Department believed that the issue was of such great importance to the public interest, this was obviously the course to pursue. There can be little doubt that it would have obtained a stay from either the trial judge or this Court. This procedure would have enabled this Court to exercise its judgment as to whether the effect of the interlocutory order was so serious as to warrant immediate review.

This Court has given repeated assurances that it is ready to employ extraordinary writs when the need is clear and impelling. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379; *Note*, 50 *Columbia L. Rev.* 1102 (1950). This Court has the power and the duty to make this sort of judgment. But what has happened in the present case is that the Department of Justice has sought to circumvent or to arrogate to itself this power. It has itself decided that the interlocutory issue is of such importance as to require immediate review, and it has proceeded to devise a procedure which it hopes will compel review of the issue at this preliminary stage of the litigation. If it is successful, a device of great promise to litigants is available to obtain review of interlocutory orders.

The Government as a party to litigation is like any other litigant. It is not entitled to special rights. *Bank Line* v. *United States*, 163 F. 2d 133, 137-138 (2d Cir. 1947). The device invented by the Government in this case will, if successful, also be available to private litigants with the result that any plaintiff who objects to an interlocutory order will be able to take a nonsuit or obtain a voluntary dismissal under Rule 41(a), and by appealing from the dismissal order, will be able to obtain review of the interlocutory order. This, we submit, is not permissible under the rules governing the jurisdiction of federal appellate courts. Review of interlocutory orders may be had only after final judgment, upon an order for contempt, or, if the issue is sufficiently grave and urgent, by extraordinary writ under 28 U.S.C. § 1651.

In the present case, the Government apparently has resorted to this device because it feels that these traditional appellate principles should not apply to the Gov-

ernment where the Department of Justice considers that the interlocutory order is important. As the Attorney General stated, he felt that "it would be unseemly" for the Government to comply with such an order or to disobey it, before seeking review (J.A. 27). This is the *only* reason advanced for the order providing for dismissal.

Assuming, however, that compliance or disobedience were the plaintiff's only alternatives, they are precisely the same that confront all litigants in respect of interlocutory orders under the rules of the federal appellate courts. It is similarly "unseemly" for them to disobey a court order; it is equally painful to have to comply with an order deemed erroneous; and it is similarly unsatisfactory to await the final decision of the trial court before vindicating a procedural right or immunity. Nevertheless, these hardships must be endured. See *Parr* v. *United States*, 351 U.S. 513.

Indeed, if the hardship is sufficiently great, it may be presented to this Court, as we have noted, by means of a petition for prerogative writ of mandamus or prohibition. This Court could then decide in orderly fashion whether the situation justified extraordinary relief. The Attorney General may not unilaterally obtain extraordinary review of a non-appealable order by the transparent device of a voluntary dismissal. In effect, this device would remove from this Court the power, in extraordinary situations, to decide whether it will review interlocutory orders by means of the extraordinary writs, and would vest that power in the hands of a resourceful litigant who obtains a nonsuit or dismissal order.

In the present case, the Attorney General took little risk in moving for dismissal in order to appeal the interlocutory order. In effect, he obtains a free ride to this Court. If the dismissal order is affirmed or if the plaintiff's appeal is dismissed, the Government may institute a new action, if it believes that it has the facts, based upon a new, up-dated complaint. The complaint herein was filed on December 11, 1952. Profound changes have taken place in the industry and in the position of the defendants, due particularly to the effect of the displacement of soaps by chemical detergents, and a new or amended complaint would in any event probably be necessary prior to trial.

In any event, we respectfully submit (1) that the Attorney General should have awaited the decision of the lower court as to what, if any, penalty or remedy it chose to impose or adopt as a result of the plaintiff-appellant's decision not to comply with the court's order; and (2) that having chosen to seek dismissal of the case rather than await the outcome, the plaintiff-appellant may not appeal.

ARGUMENT

This appeal is an attempt by the United States to obtain immediate appellate review of an interlocutory order of the district court requiring the production of certain documents prior to trial. Such an order may not, of course, be appealed. Appellate review may be had only after adjudication of the merits of the controversy, or, prior to final determination of the controversy, only by disobeying the order to produce and incurring the penalty of contempt. *Alexander* v. *United States*, 201 U.S. 117; *Cogen* v. *United States*, 278 U.S. 221; *Apex Hosiery Co.* v. *Leader*, 102 F. 2d

702 (3rd Cir. 1939); *R. D. Goldberg Theatre Corp.* v. *Tri-States Theatre Corp.*, 119 F. Supp. 521 (D.C.D. Neb. 1944).

In the present case the United States, instead of following the accepted procedures for review, is seeking to initiate a new and unique procedure for the avowed purpose of obtaining appellate review of the production order apart from and in advance of a determination of the merits.

This appeal, if allowed, will result in piecemeal review of the issues between the Government and the defendants. This Court would be undertaking to consider this litigation in fragments in direct conflict with long-established Congressional policy limiting appellate review to *final* judgments.

It is appellees' position that this appeal may not be maintained because (1) the dismissal order entered below has no greater appealability than the discovery order which underlies it; and (2) plaintiff is barred from appealing because it invited, procured and obtained the order which it now seeks to review.

1. The District Court's Order of Dismissal Is Not Appealable Because It Is Not a Final Determination of the Controversy

An order may be appealed to this Court from a district court only if it is "final". 15 U.S.C., § 29; 32 Stat. 823. Whether an order is final depends upon whether or not it represents a conclusion of the entire controversy. *Cobbledick* v. *United States*, 309 U.S. 323, 325-26. Piecemeal review of isolated issues in a controversy has been forbidden by Congress. *Ibid.*

Finality, as this Court has defined it, is a practical concept, not a matter of mere form. It "is not a tech-

nical concept of temporal or physical termination". *Cobbledick* v. *United States, supra,* at p. 326.[3]

A dismissal which leaves the merits of a controversy undetermined and arises only from a collateral or subsidiary issue is not a final order. The plaintiff may resume the controversy simply by filing a new complaint. This is illustrated by *Kelly* v. *Great Atlantic & Pacific Tea Co.,* 86 F. 2d 296 (4th Cir. 1936). That action was begun in a state court and removed by defendant into a federal court. Plaintiff moved to remand and when this motion was overruled, submitted to a dismissal. Plaintiff then sought to appeal from the dismissal, assigning as error only the order refusing remand. The Court of Appeals for the Fourth Circuit held that the judgment of dismissal was not final because the underlying order refusing to remand was not final or appealable, "and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing." 86 F. 2d at 297. Compare *V. O. Machinoimport* v. *Clark Equipment Co.,* 12 F.R.D. 191 (D.C. S.D.N.Y. 1951).

Similarly, in *Parr* v. *United States,* 351 U.S. 513, 518, this Court held that a dismissal order in a criminal case was not final and hence not appealable where the only issue determined involved venue.

In contrast to the above cases are situations where the plaintiff is, in practical effect, prevented from proceeding with the controversy so that the order actually terminates the litigation between the parties on the

---

[3] Whether a motion and order "is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances." *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, 802.

merits of the case. Such an order is final. *St. Louis, I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28. This was the case in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793. In that case certain orders of the district court prevented the United States from using for purposes of trial certain documents on which it relied. This made it impossible for plaintiff, the United States, to prove its case. The case was thereupon dismissed for failure of proof but without prejudice to bring it another time. The dismissal was not at the invitation of the plaintiff. 336 U.S. at 794. Since the United States was, in actuality, precluded by the pre-trial orders from bringing its case again, it was able to obtain review of the dismissal.

The order of dismissal entered below is clearly not a final determination of this controversy on the merits, nor does it bring to this Court for review any order of the court below which either legally or practically determines the decision of the merits of the controversy. The Government raises only one issue here: the propriety of a direction, prior to trial, requiring the plaintiff to make available certain documents to the defendants. This does not affect the merits of the action, nor does it present an obstacle to trial of the case sufficient to warrant immediate review.

This Court has frequently held that it will not permit a temporary interruption of a controversy to "consider incidentally a question which has happened to cross the path of such litigation . . ." *Segurola* v. *United States*, 275 U.S. 106, 112. Yet, if the United States is permitted to obtain review of the discovery order below, it will achieve precisely this result. Moreover, it will saddle this Court with an obligation to review similar interlocutory orders whenever a plain-

tiff chooses to bring them before the Court by means of a dismissal order. Accepting jurisdiction in this appeal will constitute a precedent for fragmentary appellate review that will hereafter plague this Court and the courts of appeals.

None of the three cases relied on by plaintiff supports jurisdiction here. In *United States* v. *Yellow Cab Company,* 332 U.S. 218, the appeal was from a district court order granting a motion by defendants to dismiss the complaint for failure to state a claim upon which relief might be granted—unmistakably a final termination of the controversy. Likewise, in *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, there was, in practical effect, a determination on the merits. The underlying orders of the court barred the plaintiff from using evidence essential to its case. The dismissal that followed, although without prejudice, was a final judgment because the privilege of the United States to bring another complaint was, lacking the necessary supporting evidence, a hollow one. Finally, in *United States* v. *Cotton Valley Operators Committee,* 339 U.S. 940, the trial court dismissed the complaint as a penalty imposed upon plaintiff for its failure to obey a discovery order. Under Rule 41(b) this dismissal, which was not requested or obtained by the plaintiff, was a determination with prejudice and forever barred the United States from again bringing its cause of action. Since the controversy could not be continued, the dismissal had the requisite finality.[4]

---

[4] This Court noted probable jurisdiction, 338 U.S. 937, and affirmed by an equally divided court, 339 U.S. 940.

2. Even if the Dismissal Order Possessed the Requisite Finality, It Is Not Appealable Because It Was Invited, Procured and Obtained by the Appellant

Appellant is before this Court in an attempt to appeal from an order which it and it alone invited and requested the district court to enter. This fact alone requires dismissal of the appeal.

The record is clear that the dismissal was invited and expressly moved by the plaintiff. The original discovery orders of July 23, 1956 provided no penalty for disobedience. They merely required the plaintiff to produce the appropriate grand jury transcripts within thirty days. The orders of dismissal were not imposed thereafter by the district court as a penalty for non-compliance. The court never reached the question of penalizing non-compliance or of providing a remedy for it. If it had it might have taken many other types of action, other than dismissal, provided for in Rule 37. Nor were the dismissal orders sought or even suggested by the defendant-appellees. The orders of dismissal were entered pursuant to an amended order obtained by plaintiff for the express and sole purpose of obtaining immediate appellate review of the discovery order.

Counsel for defendants merely indicated that in the circumstances the amended order providing for dismissal "does not seem to be a relief which they could in any manner oppose." (J.A. 32, 37, 39).

Where dismissal is at the plaintiff's request, it is well settled that the plaintiff cannot later appeal. Among the leading authorities for this rule is *Francisco* v. *Chicago & A.R. Co.*, 149 Fed. 354 (8th Cir. 1906, Sanborn, J.). The Court of Appeals refused to

review a judgment of dismissal which plaintiff had invited. It held that one who requests a judgment cannot later object to it. The court said:

> "It is said that this was an involuntary nonsuit because the plaintiff was forced to take it by the decision of the trial court that he had proved no cause of action, . . . The answer is (1) . . . an indispensable condition of its review at the instance of a plaintiff in error in a national court is that it was granted 'without his consent and against his objection,' and this judgment lacks this condition, for the nonsuit was granted at his request and by his active procurement; (2) that the plaintiff was not forced by the decision of the court below that he had failed to prove his case to take a nonsuit, but he had the option to take the verdict and judgment against him and to review it, and if it was erroneous to reverse it by writ of error, or to take the dismissal of the action and try again. . . ." (149 Fed. at 358).

This Court has said on numerous occasions that a plaintiff who has voluntarily become nonsuit, cannot sue out a writ of error. *Evans* v. *Phillips,* 4 Wheat. 73; *Central Transp. Co.* v. *Pullman's Palace Car Co.,* 139 U.S. 24, 39. Lower courts have reiterated the rule. *Marks* v. *Leo Feist,* 8 F. 2d 460 (2d Cir. 1925). As the court put it in *Cybur Lumber Co.* v. *Erkhart,* 247 Fed. 284, 285 (5th Cir. 1918), "A plaintiff cannot except to his own motion for a voluntary nonsuit, because, if it was error to grant it, he invited the error." See also *Kelly* v. *Great Atlantic & Pacific Tea Co.,* 86 F. 2d 296 (4th Cir. 1936). Compare *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, where this Court held a dismissal order appealable, saying:

> ". . . The record fails to sustain appellees' contention that the Government invited the court to enter

this order denying relief and dismissing the action." (336 U.S. at 794).

The same principle is applicable to judgments entered on consent. *Pacific Railroad Company of Missouri* v. *Ketchum,* 101 U.S. 289; *United States* v. *Babbitt,* 104 U.S. 767; *Swift & Co.* v. *United States,* 276 U.S. 311; *Ballott* v. *United States,* 171 Fed. 404 (1st Cir. 1909). Where a party, for whatever purpose, agrees to the entry of an order, the courts will not permit that party to complain about the order later on. Even if the only purpose of the consent is to permit appellate review, consent destroys the right to such review. *United States* v. *Babbitt,* 104 U.S. 767.

Whatever the circumstances, a party simply cannot be aggrieved by an order entered with his consent. Nor does the fact that the dismissal is with prejudice affect this result. In *International Carrier-Call & Television Corporation* v. *Radio Corporation of America,* 142 F. 2d 493 (2d Cir. 1944), the plaintiff consented to a dismissal with prejudice, and later sought to appeal. Although the judgment was admittedly a bar to any further action, the Court of Appeals refused to consider the appeal, saying:

> "Having consented to a final dismissal of the unfair competition count, it is utterly fatuous to suppose that this part of the judgment can be reversed on appeal." (142 F. 2d at 494).

3. No Necessity Exists for Review of the Interlocutory Order at This Time

The appellant's Jurisdictional Statement attempts to persuade this Court that the interlocutory direction entered by the court below requires review at this time. The precise contrary is true. The court's direction that

the defendants be given access to the grand jury transcripts should be reviewed only in the context of the total problems of this anti-trust case, and particularly, the problems of administration of a "Big Case" that are so burdensome and vexatious. It should not, and cannot properly, be appraised in midstream, as an abstract question.

It is by now clear that the "secrecy" of grand jury proceedings does not extend a blanket cloak of immunity for all time and in all circumstances to the testimony of witnesses. *Cf., United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 233-234; *Herzog* v. *United States,* 75 S. Ct. 349; Wigmore, *Evidence* (3d Ed.) §§ 2360, 2361. Certainly, the Attorney General is not the final judge of when and in what circumstances grand jury proceedings are to be disclosed. (*Cf.* the appellant's argument that grand jury documents are subject to the Attorney General's "privilege", Jur. St. 8-9).

The present case involves the question of whether and in what circumstances a trial court, charged with the burdensome responsibility of administering a vast antitrust case, may direct that testimony before a grand jury should be made available to defendants. This is a substantial question, but it should be decided in the light of a specific and completed situation. It certainly should not be decided by this Court in the present circumstances where (1) no order was entered implementing or refining the direction to produce; (2) the plaintiff has neither obeyed nor disobeyed; (3) discovery was in midstream and by no means completed when the order was entered; (4) the merits of the controversy are undetermined, and actually undefined. In

short, this Court should consider this problem, which has vast implications in antitrust administration, in light of an actual, completed controversy where the considerations which motivated the trial judge and the entire setting and consequences of the order may be specifically evaluated.

Certainly, in the context of the present case, it cannot be contended that the trial judge lacked jurisdiction to enter the order complained of, or that the order was an abuse of discretion. As the chronology of this case reveals, the grand jury investigation which preceded the filing of the civil complaint in this case, and which resulted in no indictments, was a device employed by the United States to gather information and for purposes of discovery. The civil action was started against these appellees just as soon as the grand jury, its investigatory work complete, was discharged. The grand jury investigation terminated on November 25, 1952; the civil complaint was filed exactly 15 days later.

The district court found that the Government was actually using in the civil actions the information obtained through the medium of the grand jury investigation. (Opinion, Jur. St. 23). The court also found that equal access to such information was needed for appellees' preparation of their defense. (Opinion, Jur. St. 23). In addition, the Court found that none of the usual reasons for maintenance of grand jury secrecy applied to the particular facts of the present case, where the grand jury had long since been discharged and the testimony in the transcripts was being used by one side in a civil case.

Finally, the district court found that the ends of justice required it to exercise its discretion under Rule 34 to compel equal disclosure of information to both sides. (Opinion, Jur. St. 23).

The order of the district court must be viewed in the light of the administrative necessities involved in a mammoth antitrust case such as this. The defendants might have taken the depositions of all persons having knowledge of the case, including all witnesses who testified before the grand jury. These witnesses might have been asked to state their recollection as to their testimony before the grand jury. Their recollection after several years would have been faulty. One of the important witnesses is deceased. But more important, this deposition procedure would have been vastly cumbersome, expensive and time-consuming. It would have achieved a result less satisfactory in the long run than disclosure of the grand jury testimony, and it would in the meantime have greatly increased the burdens of all parties and witnesses as well as the court.

The order of the district court does not purport to establish a far-reaching rule. It is merely a holding that in this "Big Case", where the Government is using information from grand jury transcripts, the fairest and most practical way to make this information available to both sides in accordance with the command of the Federal Rules of Civil Procedure is to require disclosure of the transcripts themselves rather than have this information elicited by a circuitous and unsatisfactory substitute method.

In support of its objections to the lower court's order, the United States took the position that it had some sort of privilege with respect to the grand jury

minutes. It seems appropriate to point out that under Rule 6 of the Federal Rules of Criminal Procedure it is the court and not the United States which supervises grand juries and the secrecy or disclosure of grand jury minutes. Authorized officials of the Department of Justice may have access to such information, but the Attorney General does not have a proprietary right in the grand jury minutes or any supervisory power with respect to the availability of these minutes. The district court, as the Rule makes plain, has sole responsibility for the secrecy of the minutes, and it is to the court alone that application can be made for disclosure of grand jury transcripts. Hence, the Government's claim of privilege is groundless and gains no support from cases where disclosure of documents belonging to the Government, such as reports vital to national security, has been sought.

Appellees have contended that, given even the most extraordinary circumstances, the procedure followed by the United States in attempting to obtain review of the discovery order entered below is not permissible. Certainly there is nothing in this case that should induce this Court to strain the well-established principles governing appellate review in order to consider the merits of this order at the present time.

CONCLUSION

For the foregoing reasons, appellee, Lever Brothers Company, respectfully submits that the appeal should

be dismissed or that the judgment below should be affirmed.

Respectfully submitted,

ABE FORTAS
1229 19th St. N.W.
Washington 6, D. C.
Attorney for Appellee
Lever Brothers Company

Of Counsel:

CHARLES A. REICH
ARNOLD, FORTAS & PORTER
1229-19th St. N. W.
Washington 6, D. C.

Supreme Court, U.S.
APR 1 1958

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 51

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLEE, THE PROCTER & GAMBLE COMPANY

KENNETH C. ROYALL,
Royall, Koegel, Harris & Caskey,
100 Broadway
New York 5, N. Y.

CHARLES SAWYER,
Taft, Stettinius & Hollister,
603 Dixie Terminal Building
Cincinnati 2, Ohio

RICHARD W. BARRETT,
Dinsmore, Shohl, Dinsmore & Todd,
Union Central Building
Cincinnati 2, Ohio
Attorneys for Appellee,
The Procter & Gamble Company

Of Counsel
FREDERICK W. B. PRIDI
H. ALTEN LOCHNER

New York, N. Y.

INDEX

	PAGE
COUNTER-QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. This Court Should Either Dismiss the Appeal or Affirm the Dismissal Judments Without Consideration of the Merits, Because the Judgments Were Invited and Consented to by Plaintiff	7
A. Plaintiff Moved for Dismissal of the Case	7
B. *Thomsen* v. *Cayser* Is Not in Point	8
C. Other Authorities	9
D. The Government Has No Special Right to Appeal from an Invited Dismissal	10
II. The District Court Did Not Abuse Its Discretion in Ordering Plaintiff to Produce the Grand Jury Transcripts	11
A. Grand Jury Transcripts Are in the Control of the Court and Disclosure Rests Within the Court's Discretion	11
B. The District Court Properly Exercised Its Discretion	13
(1) *Hickman* v. *Taylor* Is Inapplicable	14
(2) The Meaning of "Good Cause"	15
(3) The Historic Principle of Grand Jury Secrecy Is Inapplicable	16
(4) Production of the Transcripts Would Not Discourage Testimony Before Future Grand Juries	19

PAGE

(5) The District Court's Ruling Is Not a Precedent for Expanded Use of Grand Jury Transcripts 20

(6) The Relevancy of the Grand Jury Transcripts 21

(7) The Defendants' Need for the Transcripts 22

(8) Equal Access to the Facts Should Be Accorded All Parties 23

(9) Depositions Are No Substitute for Grand Jury Transcripts 24

(10) The District Court Must Have Wide Discretion in Administering Complex and Protracted Litigation 25

CONCLUSION 28

CITATIONS

CASES:

Anti-Fascist Committee v. *McGrath*, 341 U. S. 123.. 11
Atwell v. *United States*, 4 Cir., 162 Fed. 97 12

Bank Line v. *United States*, 2 Cir., 163 F. 2d 133 11
Bowman Dairy Co. v. *United States*, 341 U. S. 214.. 16

Cobbledick v. *United States*, 309 U. S. 323 12
Costello v. *United States*, 350 U. S. 359 18

Doe v. *Rosenberry*, S. D. N. Y., 152 F. Supp. 403... 12
Durkin v. *Pet Milk Co.*, W. D. Ark., 14 F. R. D. 385.. 16

Federal Club v. *National League*, 259 U. S. 200..... 9
Frey & Son v. *Cudahy Packing Co.*, 256 U. S. 208... 9

Hale v. *Henkel*, 201 U. S. 43 12
Herzog v. *United States*, 75 S. Ct. 349 .....16, 21
Hickman v. *Taylor*, 329 U. S. 495 .....6, 10, 13, 14, 15, 16, 24
Hoffman v. *United States*, 341 U. S. 479 12

PAGE

In re Bullock, D. D. C., 103 F. Supp. 639 12
In re Grand Jury Proceedings, E. D. Pa., 4 F. Supp. 283 12
In re National Window Glass Workers, N. D. Ohio, 287 Fed. 219 12

Jencks v. *United States*, 353 U. S. 657 25
June v. *George C. Peterson Co.*, 7 Cir., 155 F. 2d 963 .. 15

Kelly v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296 10

Mechanical Appliance Co. v. *A. Kieckhefer E. Co.*, 163 Wis. 647, 159 N. W. 556 8

Reid v. *Harper & Brothers*, S. D. N. Y., 17 F. R. D. 281 15
Roviaro v. *United States*, 353 U. S. 53 16

Safeway Stores v. *Reynolds*, C. A. D. C., 176 F. 2d 476 3
Schmidt v. *United States*, 6 Cir., 115 F. 2d 394 12

Thomsen v. *Cayser*, 243 U. S. 66 ..... 8, 9

United States v. *Alper*, 2 Cir., 156 F. 2d 222 12
United States v. *Babbitt*, 104 U. S. 767 ..... 9, 10
United States v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197 ..... 12, 14, 16, 19, 20, 24
United States v. *Byoir*, N. D. Tex., 58 F. Supp. 273; *aff'd* 5 Cir., 147 F. 2d 336 12
United States v. *Cotton Valley Operators Committee*, 339 U. S. 940 10
United States v. *Farrington*, N. D. N. Y., 5 Fed. 343 .. 12
United States v. *Oregon Med. Soc.*, 343 U. S. 326 ... 11, 22
United States v. *Rose*, 3 Cir., 215 F. 2d 617 12
United States v. *Standard Oil Company of California*, Civil No. 11584-C, S. D. Cal., C. Div., unreported 18
United States v. *The Thekla*, 266 U. S. 328 11
United States v. *Wallace Co.*, 336 U. S. 793 10
United States v. *White*, D. N. J., 104 F. Supp. 120 ... 12
United States v. *Yellow Cab Co.*, 338 U. S. 338 22
U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 .... 12, 16, 17, 19, 20

PAGE

Walker, et al. v. *Quinn et al.*, 134 S. C. 510, 133 S. E. 444 8

William A. Meier Glass Co. v. *Anchor Hocking Glass Corp.*, W. D. Pa., 11 F. R. D. 487 16

STATUTES AND RULES:

3 Arkansas Statutes (1947) Annotated, Sec. 27-2101 .. 8

2 Code of Laws of South Carolina (1952) Sec. 15-134 8

Federal Rules of Civil Procedure,

Rule 34 ..... 2, 13, 14, 15, 16

Federal Rules of Criminal Procedure,

Rule 1 12

Rule 6(e) 12, 13, 19

New York Civil Practice Act, Sec. 588(3) 8

MISCELLANEOUS:

Barron & Holtzoff, *Federal Practice and Procedure* (1950), Foreword p. v. 24

4 *Moore's Federal Practice* (2 Ed. 1950) pp. 2449-50 .. 15

Report on *Procedure in Anti-trust and Other Protracted Cases*, adopted by the Judicial Conference of the United States, 13 F. R. D. 62 ..... 25, 26

8 *Wigmore on Evidence* (3d ed., 1940) Sec. 2362 ... 12, 17, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

UNITED STATES OF AMERICA, *Appellant*, v. THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees*.	No. 51

BRIEF OF APPELLEE, THE PROCTER & GAMBLE COMPANY

COUNTER-QUESTIONS PRESENTED

1. Where the District Court has ordered plaintiff-appellant (hereinafter called "plaintiff") to produce documents and thereafter plaintiff moved to have the order changed to provide for dismissal if it does not produce, is the plaintiff entitled to appellate review when the District Court dismissed after plaintiff's failure to produce? (See Procter's* Motion to Dismiss or Affirm, filed January 2, 1957** [see R. 565]).

2. Did the court below, in the circumstances of this case, abuse its discretion in ordering plaintiff to produce grand jury transcripts of testimony which were taken, retained and used by plaintiff in the preparation of this civil action, and are relevant to and needed by defendants for such preparation?

*The Procter & Gamble Company is referred to herein as "Procter".
**Hereinafter referred to as "Motion to Dismiss Appeal".

COUNTER-STATEMENT OF FACTS

Certain inadequacies and inaccuracies in plaintiff's brief (arising, no doubt, from inadvertence or lack of familiarity with the record) require correction and comment.

The complaint in this action was filed on December 11, 1952, only sixteen days after the discharge, without return of indictments, of a grand jury which from May 1951 to November 25, 1952 investigated the same matters which are complained of in this civil action (R. 1-16, 119, 121, 207-8, 343, 386-8, 473-4).

In the proceedings before the grand jury, Procter and the other defendants had produced a large number of documents, and the testimony of twenty-eight to thirty witnesses was taken (R. 311, 385, 430-1, 471). In March 1953, plaintiff moved for and obtained from Procter under Rule 34 of the Civil Rules, production of the identical documents submitted by it, alleging, as the court below also found, that they were "needed" to aid plaintiff in the preparation of this action (R. 48-52, 58-9, 220-1, 387, 392-4).

In connection with its motion and on other occasions plaintiff conceded—and the District Court found—that plaintiff used the grand jury proceeding, in part at least, to prepare for this action (R. 59, 211-12, 387, 402, 104, 54-5, 525). For example, plaintiff stated that "The filing of the complaint results from a careful and thorough investigation of this industry, including extensive grand jury proceedings" (R. 387, 402).

Procter, actuated by plaintiff's continued use of the grand jury evidence in the civil case, moved in September 1954 for leave to inspect and copy the transcripts of the grand jury testimony* (R. 118-21, 274, 276, 337-41).

The motion was not heard by the District Court until December 12, 1955. From this lapse of time, plaintiff pur-

*It did not seek to discover the deliberations or other proceedings of the grand jury itself.

to utilize it for perjured charges (Emphasis not supplied).

* * * * *

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused * * *."

Since in this case the grand jury has long been discharged without indicting, there is no "historic principle" precluding disclosure of the transcripts. The criminal cases on which plaintiff relies in support of the principle are inapplicable. They are primarily cases where the accused sought access to the minutes to aid in quashing the indictment (P's Br. p. 38). As the court below astutely recognized (R. 215), the issue in such cases is not pretrial *discovery*, but the administrative question of whether the accused should be permitted to have in effect a "preliminary trial" or an appeal to test the "adequacy of the evidence before the grand jury" supporting the indictment. See *Costello* v. *United States*, 350 U. S. 359, 363.

Apart from these criminal cases, plaintiff refers only to a few civil cases in the district courts involving disclosure of grand jury transcripts (P's Br. pp. 42-3). In none of these cases, we submit, is there an opinion sufficiently elucidative to permit comparison with the instant case. In most, there was no opinion at all. In at least two, as the court below noted (R. 216-7), the decisions uncritically followed the line of criminal cases mentioned above. In several, it is apparent that the severe administrative problems of the "big case" were not involved. In none is it clear that the court had before it or took into account the important consideration presented in the case at bar, namely, whether or to what extent plaintiff utilized the grand jury proceeding for pre-complaint discovery and for preparation of the civil case. Indeed, in at least one case (*United States* v. *Standard Oil Company of California*, Civil No. 11584-C, S. D. Cal., C. Div., unreported), the decision was

orts to deduce (P's Br. pp. 8-9, 48) that Procter sought the ranscripts, not to discover the facts, but to ascertain exactly ow prospective witnesses "had cast their testimony".* This eduction is entirely without basis in fact. The record clearly nd definitely shows that from the time Procter moved for roduction in September 1954, it stood ready at all times to rgue its motion (unprinted transcripts of Oct. 14, 1954, Tr. 361-2; Dec. 7, 1954, Tr. 984; Apr. 19, 1955, Tr. 863, 876-7). The court below, however, with the concurrence of ll parties, including the plaintiff, deferred hearing until do- umentary discovery was concluded. As the court said (un- rinted transcript of Nov. 14, 1955, Tr. 1169):

> "* * * it was my intention first to get through with the examination of the countless documents that are going to be involved in this case, after which I thought there would be probably oral depositions taken [during the progress of the case], at which time you would raise the questions [grand jury transcript] which seem to be raised now."

The court set the matter for hearing when it did because he issue raised was squarely presented by plaintiff's motion to ake the deposition of a grand jury witness (unprinted tran- cript of November 14, 1955, Tr. 1166-9). There was never ny suggestion by defendants or the court or, until now, by laintiff, that the transcripts were desired solely for use in con- ection with the examination of witnesses.

The motions for production of the transcripts were heard y the court for two full days (R. 136-206, 128-34). In its pinions of April 17, 1956 and July 9, 1956, the District Court eld that since plaintiff had used and was using the transcripts n this civil action; since the transcripts were unquestionably

*It should also be noted that the quotation at the bottom of page 8 and the top of page 49 of plaintiff's brief did not come from the roceedings in this case, as a casual reading might indicate, but from *afeway Stores* v. *Reynolds*, C. A. D. C., 176 F. 2d 476, 478.

based upon a claim of privilege (R. 357), a claim which plaintiff has wholly abandoned here (P's Br. p. 31, fn. 13).

(4) Production of the Transcripts Would Not Discourage Testimony Before Future Grand Juries.

Plaintiff's argument in favor of secrecy of grand jury transcripts is essentially based on the claim that free and untrammeled testimony by future grand jury witnesses will be discouraged by the decision below.

Such claim is fallacious because no grand jury witness can testify with any assurance that his testimony will remain secret. Here are some of the reasons why:

(a) Criminal Rule 6(e) and many controlling authorities recognize the power of the courts to order disclosure.

(b) The liberal discovery provisions of the Civil Rules also make assurance of secrecy impossible. On depositions a witness may be interrogated as to what testimony he had given before the grand jury and, if he is truthful, he must reveal it to the extent he might remember it.* See *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 201. If he is untruthful, he is not a person entitled to protection. 8 *Wigmore on Evidence* (3d ed., 1940) § 2362.

(c) The Government admits that it feels free to use testimony taken before a grand jury in a civil, as well as a criminal case, and to seek public disclosure when to its interests to do so (R. 197-8, 274, 276). It has made open use of such testimony in the past, *Socony-Vacuum* being a prime example. It has used and plans to use further the transcripts in this case (R. 274, 276).

---

*Plaintiff has suggested the taking of the depositions of the grand jury witnesses in this case, having offered to disclose the names of such witnesses (R. 294). This would certainly negative any assurance of secrecy to these witnesses even though, as we shall later point out, such depositions would not give the defendants all of the information to which they are properly entitled.

relevant; since defendants likewise needed and should have equal access to the transcripts; and since there was no applicable reason for preserving secrecy, the ends of justice, in this complicated and protracted antitrust litigation, required disclosure of the transcripts to defendants (R. 206-39, 257-62).

Orders of July 23, 1956, consented to as to form by all parties, including the plaintiff, directed plaintiff to produce the transcripts for inspection within thirty days (R. 262-7). On the same day, plaintiff's counsel formally announced in open court that the Government declined to and would not at any time produce the transcripts called for by the orders (R. 330-1).

The ensuing proceedings which led to dismissal of the action are fully described in Procter's Motion to Dismiss the Appeal. They may be briefly summarized as follows.

Before the thirty days expired, plaintiff moved for an amended order in substitution for the production orders of July 23 and tendered a proposed amended order providing that "unless the plaintiff on or before August 24, 1956 produces * * * the aforesaid transcripts * * * the Court will enter an order dismissing the complaint herein" (R. 318). Only in the event the court declined to enter such an order did plaintiff ask for a stay pending an appeal or application to this Court for an extraordinary writ (R. 317, 333, 334).

Plaintiff erroneously asserts (P's Br. pp. 11, 19, 22, 29), that Procter and the other defendants "acquiesced" in and "did not oppose" the amended order initiated by plaintiff. What actually happened was that Procter, for example, specifically informed the court orally and in writing that it thought that the production order of July 23rd was "a proper and *sufficient** order", necessarily meaning that Procter did not favor the proposed amended order. Without "waiving this position", it then merely stated the obvious, that plaintiff's "proposed *relief* of production or [of] dismissal does not seem to be a re-

*Emphasis supplied throughout unless otherwise noted.

(d) Indeed, the Department of Justice has publicly announced, without qualification, that in civil antitrust cases it intends to use the grand jury proceedings (including transcripts of testimony) (R. 210-11). This is full notice to grand jury witnesses that their testimony is not likely to be cloaked in secrecy.

(e) As the District Court said (R. 214), the guarantee of secrecy to the witness is at most temporary and ceases when the grand jury is discharged. To extend the guarantee further would encourage perjury. *U. S. v. Socony Vacuum Oil Co.*, *supra*, p. 233-4; *United States v. Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 201; 8 *Wigmore on Evidence* (3d ed., 1940) § 2362.

In view of the foregoing respects in which resort may be had to grand jury testimony, we submit that it cannot fairly be urged that the production of the transcripts in this case would have any adverse effect upon future grand juries.

(5) The District Court's Ruling Is Not a Precedent for Expanded Use of Grand Jury Transcripts.

Apart from the above reasons, the production orders in this case are not, as plaintiff would have this Court believe (P's Br. pp. 38-44), precedents for disclosure in any other case. Each case must be decided on its own facts. Indeed facts similar to those here involved could not arise other than in protracted civil litigation where the grand jury proceedings were used as pre-complaint discovery, where the Government admittedly made use of the transcripts to prepare for trial, where, as we will show, the defendants need the transcripts in order adequately to prepare their defense and where solution of complex administrative problems demands the fullest possible discovery.

The narrow scope of the decision below was, indeed, made abundantly clear by the District Court (R. 303, 307, 310):

> "It was not my intention, of course, to tear the curtain right off the grand jury for any purpose. I thought that my opinion was very careful, and I was only judging the facts in this case, and this type of litigation.
>
> * * *
>
> "In other words, I don't want to make a burdensome Big case more burdensome for anybody. It is bad enough at its best. * * *
>
> * * *
>
> "* * * when I wrote this opinion I had one type of litigation in mind—an antitrust suit. I am not worrying about a suit involving an Air Force plane, I am thinking about an antitrust suit, something that is tailored for antitrust suits alone, unless we are going to live a lifetime in trying one a generation."

And even the plaintiff conceded that its concern as to the policy considerations involved would be lessened if the decision below was limited to antitrust cases.* Yet, as pointed out above, the court in fact so limited its decision, stating "when I wrote this opinion I had one type of litigation in mind—an antitrust suit" (R. 310).

In the light of all of the above considerations, we submit that plaintiff has cited no valid reason which weighs against "the policy which seeks to leave no stone unturned in seeking justice in * * * [this] particular case". *Herzog* v. *United States*, *supra*, p. 352.

In the remainder of this brief we will set forth the affirmative reasons why the District Court properly exercised its discretion in ordering the production of the grand jury transcripts.

(6) The Relevancy of the Grand Jury Transcripts.

On principle, we maintain that, in the setting of this case, it should suffice to sustain disclosure of the transcripts to show that they are relevant to the case. Little, if any, more should

---

*Plaintiff's counsel stated that it "would take a less serious view of this matter if we thought that the result of any ruling * * * could be limited to antitrust situations" (R. 310).

lief which Procter *could* in any manner oppose" (R. 334, 323-4, 335-6).

On August 21, 1956, the court signed plaintiff's proposed order (R. 322-3). When, in accordance with plaintiff's formal announcement a month earlier, it did not produce, the action was dismissed on September 13, 1956, *"as provided in the amended order"* (R. 361, 362, 325-6). The quoted phrase shows that plaintiff is again in error when it states (P's Br. p. 12) that the court "recognized" that dismissal was not the result of the amended order.

Plaintiff likewise errs in stating that "the court selected dismissal as the consequence of non-compliance" (P's Br. p. 12). Plaintiff was the one who selected dismissal as the specific and sole consequence of non-compliance. There were several alternative consequences, and dismissal was not a necessary one. Dismissal was never suggested by either the court or the defendants.

SUMMARY OF ARGUMENT

1. This Court Should Either Dismiss the Appeal or Affirm the Dismissal Judgments Without Consideration of the Merits, Because the Judgments Were Invited and Consented to By Plaintiff. Plaintiff, by moving for and obtaining an amended order, providing specifically for dismissal in the event of failure to produce the transcripts, thereby invited and consented to the dismissal which followed its failure to produce, and has no right to maintain an appeal from such dismissal (See Procter's Motion to Dismiss Appeal). None of plaintiff's contentions or authorities (P's Br. pp. 17-30) disturbs this conclusion.

2. The District Court Did Not Abuse Its Discretion in Ordering Plaintiff to Produce the Grand Jury Transcripts. The District Court has power to determine, in the exercise of its discretion, whether transcripts of grand jury testimony

be required. In the instant case, relevancy, in fact, is unquestioned. As the District Court found, "* * * such a contention [of irrelevancy] would be disingenuous in view of the fact of plaintiff's use of the transcripts" (R. 213, 338, 473-4).

(7) The Defendants' Need for the Transcripts.

It is significant, however, that the District Court required much more of defendants than the necessary showing of relevancy. It stated that "a strong and positive showing [of need] should be required of persons seeking to break the seal of secrecy, which never should be done except in extreme instances, * * *" (R. 217).

The District Court found that, on the record, an adequate showing had been made to satisfy even its strict standard. It said (R. 217):

> "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy".

Such findings, made by a judge to whom the case has been assigned from the beginning, must control unless "clearly erroneous". *United States* v. *Oregon Med. Soc.*, 343 U. S. 326; *United States* v. *Yellow Cab Co.*, 338 U. S. 338. The facts fully justified the court's findings.

The defendants' need for the transcripts was clearly demonstrated by plaintiff's admitted use of them for its discovery and in the preparation of its case (R. 274, 276). In addition, as we have noted above, plaintiff in securing an order for access to the grand jury material asserted that it was relevant and "needed to aid the plaintiff in the preparation of its case" (R. 52, 58-9, 392-3). Plaintiff there asserted that this "need" was sufficient "good cause" to support its motion.*

*But when the same "good cause" and more is shown in support of defendants' motions, the plaintiff now inconsistently argues not only that it is insufficient but that the court's finding of need represents an abuse of discretion.

within its control should be disclosed, and plaintiff has failed to show an abuse of discretion. Plaintiff's principal contention is that defendants did not meet the "good cause" test of *Hickman* v. *Taylor*, 329 U. S. 495. But *Hickman* enunciates no test of "good cause" universally applicable. In each case disclosure depends on weighing the needs of the party seeking disclosure against countervailing considerations, if any.

Here, there are no applicable countervailing considerations. For there is no controlling "historic principle" of secrecy precluding disclosure of grand jury transcripts for civil discovery purposes, and production would not deter "free and untrammeled disclosures" by witnesses before future grand juries. On principle, therefore, defendants should be required to show little, if any, more than relevancy, which was unquestioned.

In any event, the District Court imposed on defendants a "strong and positive" test of "good cause" and held that defendants had satisfied the requirements of that test (R. 217). The court below, by virtue of its intimate familiarity with the history of this protracted antitrust litigation, knew the difficult and peculiar administrative problems involved and the unequal status of the parties with respect to their ability to prepare. It found that plaintiff had admittedly used the grand jury to prepare for a civil case, that plaintiff was admittedly using the transcripts to prepare for trial, that defendants would be aided in their preparation by having access to them, that defendants could not obtain such information in any other manner, and that any requirement of secrecy could be safely waived in this particular case. These findings have not been and, we respectfully submit, cannot be successfully challenged.

In addition to the documentary material to which plaintiff secured access, plaintiff has also admittedly taken and used the transcripts of the grand jury testimony, all of which were necessarily a part and parcel of the composite grand jury evidence.

In view of the foregoing, the District Court properly found that plaintiff's use of the transcript is "perhaps sufficient reason why the ends of justice require production of the transcripts for defendants' use" (R. 213).

As also bearing upon the question of the defendants' need, the District Court found that defendants would be "aided by such production" (R. 213). This is especially true in this particular case. While proof in antitrust litigation is generally documentary in character, plaintiff has not denied that it proposes to rely on oral testimony concerning conversations and other matters in this case, perhaps to an important extent (R. 170, 526).

(8) Equal Access to the Facts Should be Accorded All Parties.

Moreover, without disclosure to defendants, plaintiff could cull from the transcripts information which supported its case, while Procter would never know whether the testimony before the grand jury contained information useful to its defense or reasonably calculated to lead to discovery of admissible evidence. The transcripts may be used by plaintiff to serve as a guide to prepare for examination and cross-examination, and for interrogatories, stipulations, admissions and other pre-trial discovery. Only disclosure to defendants would afford them an equal benefit, which presently they lack. Giving the plaintiff an exclusive advantage, particularly unconscionable when derived from judicial records, could vitally affect the outcome of the litigation. The trial, instead of being on the merits, could turn on surprise or on presentation of less than all the relevant facts. Without the transcripts the defendants would never know whether all material facts were presented to the court (R. 119-21, 341, 526).

ARGUMENT

I.

THIS COURT SHOULD EITHER DISMISS THE APPEAL OR AFFIRM THE DISMISSAL JUDGMENTS WITHOUT CONSIDERATION OF THE MERITS, BECAUSE THE JUDGMENTS WERE INVITED AND CONSENTED TO BY PLAINTIFF.

Procter has fully set forth its position and the authorities in support thereof in its Motion to Dismiss the Appeal, to which the Court is respectfully referred. We will not repeat them here except as necessary to correct and reply to statements in plaintiff's brief.

A. Plaintiff Moved for Dismissal of the Case.

Plaintiff refers repeatedly (P's Br. pp. 12, 20, 21, 22, 29, 30) to what it terms its "suggestion" that the trial court dismiss the action. This is an inaccurate characterization of plaintiff's conduct. The fact is that instead of making a "suggestion" plaintiff definitely and formally moved for a dismissal in the event of non-production (R. 317-8). Since plaintiff had already unequivocally asserted in open court that it would never produce the transcripts, the necessary effect of plaintiff's invited amendment was dismissal of the action (R. 330-1). This conduct was as explicit an invitation or consent to dismissal as may be found in any of the pertinent authorities where review was denied (See Procter's Motion to Dismiss Appeal, pp. 8, 12, 15, 17).

Furthermore, plaintiff well knew that there were a "number of alternatives" (R. 332-3) available to the court as a consequence of plaintiff's refusal to produce, these including a stay, limitation of plaintiff's evidence, contempt or dismissal. No one—neither the court nor any of the parties—had previ-

Such a result would be the antithesis of the principle of mutuality of discovery and elimination of surprise, which is one of the cornerstones of the Federal Rules. See *Hickman* v. *Taylor*, 329 U. S. 495; Barron & Holtzoff, *Federal Practice and Procedure* (1950), Foreword p. v.

As this Court said in *Hickman* (p. 507):

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

In the case of a judicial document, transcript or otherwise, under the control of the court, it is, we submit, unthinkable that one party should enjoy exclusive access. The court should "obviously * * * treat the parties alike in their rights to relevant testimony." *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202. We are confident that this Court will do so.

(9) Depositions Are No Substitute for Grand Jury Transcripts.

It is no answer for plaintiff to assert (P's Br. p. 47) that defendants did not claim or show that the grand jury "witnesses are no longer available or can be reached only with difficulty." In the first place, the District Court in both opinions found against plaintiff's contention, saying, "I would not grant these motions if I thought * * * defendants already possessed all the necessary information or could obtain it by pursuing a different remedy" (R. 217, 261).

Plaintiff's contention that depositions are an adequate substitute for disclosure of the transcripts is erroneous for several reasons.

(a) There were "28 or 30 witnesses", scattered from coast to coast (R. 169, 301, 311).

(b) One witness is dead and although the others may be available, it would be extremely burdensome and expensive to reach them and take their depositions (R. 472, 526-7).

ously suggested or even mentioned an order of dismissal in the event plaintiff did not produce the transcripts.

It is immaterial that plaintiff did not consent to the earlier orders that the transcripts should be produced. (See P's Br. p. 25).* This appeal is not from the production orders themselves. The only relief plaintiff seeks in this Court, and the only relief it could seek, is that the "judgments * * * dismissing the complaint * * * should be reversed" (P's Br. p. 53). Yet, judgments of dismissal were precisely what plaintiff invited.

B. *Thomsen* v. *Cayser* is Not in Point.

Plaintiff principally relies on *Thomsen* v. *Cayser*, 243 U. S. 66 (P's Br. pp. 23-6). There, the Court of Appeals had entered a judgment adverse to plaintiffs by reversing the district court's judgment in plaintiffs' favor and had remanded for a new trial. As this Court said (p. 76), the plaintiffs there *"waived any right to a new trial* and consented that the case be disposed of one way or the other." *"The plaintiffs did not consent to a judgment against them,* but only that, if there was to be such a judgment, it should be final in form* * *" (p. 83).

The line of authority represented by *Thomsen* presents very different factual and legal considerations than does the case at bar. *Thomsen* illustrates the principle that a plaintiff who in the trial court obtained judgment on the merits, which judgment was reversed by the intermediate appellate court and a new trial granted, may elect to avoid the expense of a second trial, and may stand on the record and take an appeal. In other words, plaintiff merely waives a new trial. The general principle is widely recognized and is codified by statute in some jurisdictions.**

---

*It did consent to the form of the production orders thus attesting to their sufficiency (R. 263, 264, 266, 267).

**See New York Civil Practice Act § 588 (3); 3 Arkansas Statutes (1947) Annotated, Sec. 27-2101; 2 Code of Laws of South Carolina (1952) § 15-134; *Mechanical Appliance Co.* v. *A. Kieckhefer E. Co.*, 163 Wis. 647, 159 N. W. 556; *Walker, et al.* v. *Quinn et al.* 134 S. C. 510, 133 S. E. 444.

(c) The events and records which were the subject of the investigation not only covered a long period of years (R. 9), but also events which were current in 1952 and within the fresh recollection of the witnesses when they testified before the grand jury.

(d) Since the issues have not yet been finally narrowed and clarified (R. 239-40; unprinted transcript of April 19, 1955, Tr. 862) depositions would require defendants to examine the grand jury witnesses on every conceivable issue that could be raised under the Sherman Act (R. 301).

(e) Even when a case is uncomplicated or the facts as to which a witness testifies are simple, "time dulls treacherous memory", as said in *Jencks* v. *United States*, 353 U. S. 657, 667. That truism is infinitely more applicable in the case of grand jury witnesses, testifying six years ago with respect to a large industry's activities both in distant and recent years. They could not—and could not be expected to—reproduce their testimony with any degree of accuracy (R. 302, 526-7).

Thus for the foregoing reasons such depositions would not be a workable or adequate substitute for the transcripts. They could not conceivably develop all the facts which today are unavailable to defendants.

(10) The District Court Must Have Wide Discretion in Administering Complex and Protracted Litigation.

This case is one of the typical so-called "Big Cases" which "while not numerous, are of sufficient frequency to create an acute major problem in the current administration of justice" (Prettyman Report on *Procedure in Anti-trust and Other Protracted Cases*, adopted by the Judicial Conference of the United States, 13 F. R. D. 62, 64). The problem is so serious that unless it is solved "the judicial process itself in respect

This principle is in no wise applicable to the situation in the instant case, nor is it applicable to the like case of voluntary nonsuits in the trial court as a result of adverse preliminary rulings or rulings during the course of the trial. In neither of these latter situations can a plaintiff sustain an appeal from a dismissal of the case. The authorities have been discussed in Procter's Motion to Dismiss the Appeal, pp. 8-9, 12, 15-17, 19.

The inapplicability here of *Thomsen* and the similar case of *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208 (cited by plaintiff, P's Br. p. 25) is pointed up by Justice Holmes' characterization in *Federal Club* v. *National League*, 259 U. S. 200 (also relied on by plaintiff, P's Br. p. 25):

> "The appellee, the plaintiff, elected to stand on the record in order to bring the case to this Court at once, and thereupon judgment was ordered for the defendants. * * * It is not argued that the plaintiff waived any rights by its course. *Thomsen* v. *Cayser*, 243 U. S. 66" (p. 208).

In the instant case, plaintiff did not merely stand on the record. The situation here is that although there were alternative remedies, and dismissal was not a necessary consequence of non-compliance with the production orders, plaintiff affirmatively invited, moved for and consented to the very judgment it seeks to have reviewed—namely the dismissal of the complaint. To declare a case of this nature within the principle of *Thomsen* would encourage appeals from all types of interlocutory decisions arising before or during a trial.

C. Other Authorities.

Of the many cases cited in Procter's Motion to Dismiss the Appeal, plaintiff attempts to distinguish only *United States* v. *Babbitt*, 104 U. S. 767—and this on the ground that there plaintiff "consented to a change in the substance, and not just the form, of the order" (P's Br. pp. 27-8). But plaintiff's con-

sent to a dismissal of its case (as opposed to a stay, for example) is definitely of substance. Furthermore, reviewability turns on the nature of the right which appellant has waived by its consent. In *Babbitt* and in this case, the respective appellants consented to judgments against them. From an invited judgment a party cannot appeal and it matters not that the reason for the consent was to facilitate an appeal (See Procter's Motion to Dismiss the Appeal, pp. 15-6).

Plaintiff's reliance on *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940, and *United States* v. *Wallace Co.*, 336 U. S. 793, 794-5 (P's Br. pp. 21-2), is misplaced. In neither case did the plaintiff invite or consent to the dismissal. Thus, the cases differ from the instant case in respect of the very point on which appealability turns.

D. The Government Has No Special Right to Appeal From an Invited Dismissal.

A private litigant has no right to convert interlocutory orders into appealable judgments by the "simple expedient of taking a voluntary nonsuit" or inviting a dismissal. *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296, 297. We submit that the Government has no greater right.

Nor is plaintiff's position enhanced by the claim that it sought the order to avoid embarrassment. Private parties frequently must face the consequence of disobeying court orders or awaiting a final decision in the normal course of litigation before obtaining review. See, *e. g.*, *Hickman* v. *Taylor*, 329 U. S. 495. No arm or representative of the Government has any greater privilege against embarrassment than does a private citizen.

In this respect it is plainly indefensible for plaintiff to claim that the Government, when a plaintiff in civil litigation, is to be accorded special status insofar as the standards of appealability are concerned or that less is required of it than of private

litigants. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 177; *United States* v. *The Thekla*, 266 U. S. 328, 339-40; *Bank Line* v. *United States*, 2 Cir., 163 F. 2d 133, 138. As Mr. Justice Douglas said, in the *Anti-Fascist* case, *supra* (p. 177):

> "To let the Government adopt such lesser * * * [standards of fair dealing] as suits the convenience of its officers is to start down the totalitarian path."

Plaintiff's reference to the "broad public interest in obtaining a determination of the violation of the antitrust laws" (P's Br. p. 19) is but another example of plaintiff's efforts to invoke special privileges in this litigation (R. 127, 187-8, 211, 248, 332-4; 139, 197-9, 360, 210, 261-2). This "public policy" argument in the instant case is also more atmospheric than real. Whatever the disposition of this appeal by this Court, we know of no reason why plaintiff, if it continues to believe that there are violations of the antitrust laws which presently should be enjoined, cannot bring a new action based on such antitrust allegations as may be appropriate. If the Government prevailed, whether on the present complaint or a new one, the relief to which it would be entitled would be the same, that is, only such relief as would be necessary to enjoin now existing violations of the antitrust laws, and to insure against future violations. *United States* v. *Oregon Med. Soc.*, 343 U. S. 326.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING PLAINTIFF TO PRODUCE THE GRAND JURY TRANSCRIPTS.

A. Grand Jury Transcripts are in the Control of the Court and Disclosure Rests Within the Court's Discretion.

The grand jury is an appendage of the court which calls it into existence, and is under the court's supervision and control.

It is not an arm of the Department of Justice. *Cobbledick* v. *United States*, 309 U. S. 323, 327; *Hale* v. *Henkel*, 201 U. S. 43, 59; *Hoffman* v. *United States*, 341 U. S. 479, 485; *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202; *In re National Window Glass Workers*, N. D. Ohio, 287 Fed. 219, 225. Accordingly, the District Court and not the Department has the power to determine whether testimony before a grand jury should be disclosed.*

This rule of law is codified in Rule 6(e) of the Federal Rules of Criminal Procedure which provides for disclosure when directed by the District Court.** In reality, therefore, defendants' motions to produce seek disclosure of the transcripts from the District Court and not from the Government. As the court said in *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp, 197, 202:

> "It therefore follows that, strictly speaking, defense is here seeking disclosure, not from plaintiff, but from the Court itself, which obviously should treat the parties alike in their rights to relevant testimony."

---

*U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4; *United States* v. *Byoir*, N. D. Tex., 58 F. Supp. 273, 274, 275; *aff'd* 5 Cir., 147 F. 2d 336; *United States* v. *Alper*, 2 Cir., 156 F. 2d 222, 226; *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 629; *Schmidt* v. *United States*, 6 Cir., 115 F. 2d 394, 397; *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202; *United States* v. *Farrington*, N. D. N. Y., 5 Fed. 343, 346-7; *In re Grand Jury Proceedings*, E. D. Pa., 4 F. Supp. 283, 284-5; *United States* v. *White*, D. N. J., 104 F. Supp. 120, 121; see also *Atwell* v. *United States*, 4 Cir., 162 Fed. 97, 99-101; 8 *Wigmore on Evidence* (3d ed., 1940) § 2362.

**The applicability of Rule 6(e) is not confined to criminal cases. Although Criminal Rule 1 provides that the Criminal Rules "govern the procedure * * * in all *criminal proceedings* * * *", Rule 6(e) authorizes disclosure of matters occurring before a grand jury "when so directed by the court preliminarily to or in connection with a *judicial* proceeding * * *." So striking a contrast leaves no doubt that Rule 6(e) grants discretionary power to the court in *any* "judicial proceeding", including civil cases. See *United States* v. *Ben Grunstein & Sons Company, supra; In re Bullock*, D. D. C., 103 F. Supp. 639, 641; *Doe* v. *Rosenberry*, S. D. N. Y., 152 F. Supp. 403, 406.

The discretion vested in the District Court is thus derived not only from Civil Rule 34, as the plaintiff seemingly argues, but stems from three sources—the common law, Criminal Rule 6(e) and Civil Rule 34—and the propriety of the exercise of such discretion should not be tested solely by judicial constructions of "good cause" in particular and factually different cases under Rule 34.

Here, the District Court, engaged in the administration of a difficult case, was uniquely qualified to exercise its discretion to determine the needs of the respective parties. It knew the history of the litigation and the status of discovery. It was in a position to observe the reluctance of plaintiff to cooperate in mutual discovery efforts (R. 126, 218, 229, 231, 233, 329-31, 235).* It could best judge whether defendants' lack of access to the grand jury transcripts seriously hampered their ability to prepare and impaired the expeditious handling of the case (see R. 218-239).

B. The District Court Properly Exercised Its Discretion.

Plaintiff has abandoned all its contentions in the District Court save that of an alleged failure on the part of defendants to show "good cause" for production of the grand jury transcripts. And as to this contention, its position is premised solely on the unsupported theory that such "good cause" can only be shown by satisfying the relatively stringent tests adverted to in *Hickman* v. *Taylor*, 329 U. S. 495. While, as we shall later demonstrate, defendants' showing of "good cause" was sufficiently compelling to satisfy the requirements of *Hickman*, we first submit that there is no rule of law or logic which justifies the application of *Hickman* to the circumstances of this case.

*For example, as the Court below pointed out, considerable time and effort was uselessly expended because of plaintiff's refusal to admit, until the later rehearing of the motions, that it had used and intended to use the grand jury transcripts in preparing the civil case (R. 139, 197-9, 360, 209-12, 274, 276, 261-2).

(1) *Hickman* v. *Taylor* is Inapplicable.

Hickman involved an effort by plaintiff in a personal injury action to pry into the work product of defendants' attorney.* As appears from a consideration of the majority and concurring opinions, plaintiff sought from the opposing attorney two types of documents, (1) memoranda prepared and to be prepared by the lawyer himself as to the substance of oral statements made to him by witnesses, and (2) written statements by the witnesses themselves which had been procured by the lawyer as part of his preparation.

With respect to the first category, this Court held that only in a "rare situation" and upon the showing of compelling circumstances should a lawyer be required to disclose his mental "impressions" or his own memoranda of a witness' oral statements to him. It is specious to analogize, as plaintiff here attempts, the grand jury transcripts recording the actual testimony of the witnesses themselves to a lawyer's summary of what may have been told him by prospective witnesses.

As to the second type of statements in the *Hickman* case (which more closely resembles the testimony before the grand jury), the Court plainly indicated that production might have been justified had plaintiff made some showing of need, such as "hardship or injustice" or "where the witnesses * * * can be reached only with difficulty" (p. 509-11, 513). And as said in the concurring opinion, discovery of such documents may be had upon a showing of good cause no greater than that required by Rule 34. The *Hickman* decision, however, was

---

*Plaintiff employs the *Hickman* case as an analogy. It does not seriously contend that grand jury transcripts are "work product" (See P's Br. p. 38). We think it plain that testimony obtained by judicial process, under the control of the court and its grand jury, is not comparable to work product. Since it is a judicial document, "It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by Hickman, supra." *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202.

based upon the ground that "demand [was] * * * made on the basis of right, not on showing of cause" (p. 519).*

The instant case presents an entirely different situation, with relevancy and need being clearly shown. Thus, we submit, *Hickman* enunciates no principle supporting plaintiff's contentions or militating against disclosure of the grand jury transcripts.

(2) The Meaning of "Good Cause."

As plaintiff itself aptly said earlier in this case (when it sought grand jury documents under its own Rule 34 motion) (R. 392):

> "The showing of good cause required by Rule 34 varies according to the facts of the particular case and considerations of practical convenience. * * * *Moore's Federal Practice* * * * states (4 Moore's Federal Practice [2 Ed. 1950], pp. 2449-2450):
>
> " 'The party seeking inspection is required to show "good cause therefor." Considerations of practical convenience should play the *leading role* in determining what constitutes good cause.' " (Emphasis not supplied).

It was upon this basis that the plaintiff sought and the District Court ordered production of the grand jury documents.

Under many circumstances it is held that relevance alone is sufficient to constitute good cause, and in others that good cause is established by a showing that the documents would aid in the preparation of the case, would reduce expense, or that denial of access would cause hardship or injustice. *Reid* v. *Harper & Brothers*, S. D. N. Y., 17 F. R. D. 281, 283-4; *June* v. *George C. Peterson Co.*, 7 Cir., 155 F. 2d 963, 967;

---

*In the *Hickman* case it was shown that an actual and full transcript of the testimony of the witnesses before the United States Steamboat Inspectors was made available to plaintiff (p. 509). In the instant case no copies of the transcript or any equivalent are available to the defendants.

Durkin v. *Pet Milk Co.*, W. D. Ark., 14 F. R. D. 385, 396; *William A. Meier Glass Co.* v. *Anchor Hocking Glass Corp.*, W. D. Pa., 11 F. R. D. 487, 490. Indeed, on the criminal side, where a more restrictive discovery philosophy prevails*, even the informer's privilege** yields where disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause * * *." *Roviaro* v. *United States*, 353 U. S. 53, 60-1 (cited by plaintiff, P's Br. p. 41).

In each case, we submit, the decision must rest upon balancing the needs of the party seeking discovery against the hardship which might be imposed on his opponent or against other applicable countervailing considerations. This should be true whether we speak of "good cause" under Civil Rule 34, or the "ends of justice" test applied specifically to disclosure of grand jury transcripts in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4. Such a balancing of equities seems implicit in Mr. Justice Douglas' observation in *Herzog* v. *United States*, 75 S. Ct. 349, 352:

> "There has been a conflict between the policy requiring secrecy of grand jury minutes and the policy which seeks to leave no stone unturned in seeking justice in a particular case." †

(3) The Historic Principle of Grand Jury Secrecy Is Inapplicable.

In considering the equities in the case at bar it is plain that, unlike *Hickman*, no prejudice or hardship could result

---

*Compare, for example, *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221, indicating a "fishing expedition" is improper in criminal cases, with *Hickman* v. *Taylor*, 329 U. S. 495, 507, where such "expeditions" in civil cases are approved.

**Plaintiff admits that all grand jury witnesses testified "under compulsion of subpoena" (P's Br. p. 41). Thus they were not informers.

†It is equally clear from *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, where the court said (p. 199):

> "Basically, therefore, the issue here is, as to how to coordinate justly the policy of the Federal Rules of Civil Procedure for free, full discovery before trial for both parties, with the traditional policy as to the secrecy of Grand Jury proceedings."

to plaintiff itself, as a litigant in this case, from the production of the transcripts. Nor does plaintiff make any such claim. Instead, plaintiff, assuming to itself the role of protector of the grand jury processes (see R. 248), rests its position upon two contentions, (1) the "historic principle that grand jury proceedings shall be conducted in secrecy" (P's Br. p. 38), and (2) the fear that production here will discourage "free and untrammeled disclosures by persons [testifying before future grand juries] who have information with respect to the commission of crimes" (P's Br. p. 40).*

We do not, of course, dispute the existence of a so-called "historic principle" in favor of grand jury secrecy. We do not, for example, ask that the deliberations of the grand jurors be disclosed. However, so far as the testimony of grand jury witnesses is concerned, there has never been a guarantee of more than temporary secrecy.

The witness' privilege of secrecy does not survive the discharge of the grand jury. *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4; 8 *Wigmore on Evidence* (3d ed., 1940) § 2362. As Wigmore explains (§ 2362):

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury.
>
> * * * * *
>
> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able

*Indeed, in the court below plaintiff admitted that "were it not for the * * * fact that the examination was conducted before a grand jury, I would think that there would be some weight to be given to their [defendants'] claim" (R. 192).

Page

Rudolph v. *Sensener*, C.A.D.C., 1912, 39 App. D.C. 385 15
Schmidt v. *United States*, 115 Fed. 2d 394 32
Stewart v. *Lincoln-Douglas Hotel Corp.*, 7 Cir., 1953, 208 F. 2d 379 15
Thomsen v. *Cayser*, 243, U.S. 66 ..... 17, 18
United-Electrical, Radio and Machine Workers of America, 111 Fed. Supp. 858 33
United States v. *U.S. Alkali Export Association, Inc.*, D.C. S.D. N.Y. 1946, 7 F.R.D. 256 36
United States v. *All American Airway, Inc.*, 9 Cir., 1950, 180 F. 2d 592 15
United States v. *Alper*, 2 Cir., 156 F. 2d 222 38
United States v. *Amazon Industrial Chemical Corporation*, D.C. Md. 1931, 55 Fed. 2d 254 ..... 32, 39, 41
United States v. *Ben Grunstein & Sons Company*, 137 Fed. Supp. 197 ..... 32, 46
United States v. *Babbitt*, 104 U.S. 767 ..... 15, 16
United States v. *Byoir*, D.C. N.D. Tex. 58 Fed. Supp. 273, Aff'd. 5 Cir., 147 F. 2d 336 ..... 32, 34, 38
United States v. *Cotton Valley Operators Committee*, 339 U.S. 940 17
United States v. *Evans*, 5 Cranch 280 15
United States ex rel. Touhy v. *Ragen*, 340 U.S. 462 .. 16
United States v. *Neff*, 212 Fed. 2d 297 32
United States v. *Olmstead*, 7 Fed. 2d 756 ..... 28, 29
United States v. *Rose*, 3 Cir., 215 F. 2d 617 ..... 38, 39
United States v. *Schine Chain Theatres, Inc.*, D.C. W.D. N.Y. 1942, 2 F.R.D. 425 36
United States v. *Smyth*, 104 Fed. Sup. 283 ..... 32, 33
United States v. *Socony-Vacuum Oil Company*, 310 U.S. 150 ..... 10, 38, 48
United States v. *Star Construction Co.*, 10 Cir., 1951, 186 F. 2d 666 16
United States v. *White*, D.C. N.J. 104 F. Supp. 120 38

Page

United States v. *Zucca*, 351 U.S. 91 17
Water-Works Co. v. *Barret*, 103 U.S. 516 15

CONSTITUTIONAL PROVISIONS AND RULES:

Constitutional Amendment V 1, 9, 27, 28, 29

Federal Rules of Civil Procedure, 28 USC

Rule 34 ..... 19, 34, 35
Rule 37(b) 16
Rule 41 2
Rule 41(a)(1)(i) 15
Rule 41(a)(1)(ii) 15
Rule 41(a)(2) 2, 15
Rule 41(b) 14, 15

Federal Rules of Criminal Procedure

Rule 6(e) 10, 32, 38, 41

MISCELLANEOUS:

1 Barron and Holtzoff, *Federal Practices and Procedure* (1950), Foreword p. v 36
Hearing Before the Anti-Trust Sub-Committee of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., Part I, pp. 244, 245 ... 23
Judicial Conference Report of September, 1951 (13 F.R.D. 61) 44
1 *Moore's Federal Practice* (1938) 36, 37
Pike and Willis, the *New Federal Deposition-Discovery*, 38 Col. L. Rev. 1179 (1938) 36
VIII *Wigmore on Evidence, 3rd Ed.*
§ 2362 ..... 10, 39, 40
§ 2374 42

to complex controversies [is threatened]" (13 F. R. D. at p. 64). The Report added (13 F. R. D. at p. 65):

> "The person who must insure that a case of this nature is thoroughly prepared prior to the trial is the trial judge himself."

Among the steps in the pre-trial phases recommended in the Judicial Conference Report are (13 F. R. D. at p. 72):

> "to insure that counsel for all parties are thoroughly prepared for the trial *according to the requirements of the trial judge* as to an efficient and economical presentation of evidence and argument;
>
> "to insure that each party is as well informed as circumstances permit concerning what his adversary will proffer; * * *."

In order properly to discharge these responsibilities and properly to channel the proceedings, the judge must necessarily have broad discretionary powers and the Rules of Civil Procedure endow him with them.

The trial judge in this case undertook these responsibilities early in the proceedings. From its inception, one troublesome aspect of the instant case, as the court saw it, was the great advantage in preparation possessed by plaintiff (R. 127, 218, 233, see also 526). As the court expressed it on one occasion (R. 127, 233):

> "One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer [over four years by the time the grand jury transcript motions were argued and more than six years now], how long must we wait for defendants to prepare their case? The sooner defendants are informed of plaintiff's factual contentions, the sooner defense preparation can commence—and not before, obviously."

As the Appendix to the District Court's opinion of April 17, 1956, plainly shows (R. 218-240), the trial judge was very alive to the problems raised and the needs of the parties. From extended contact wtih the case he knew, better than anyone else, what complications and expenditure of time and money lay ahead if the motions were not granted. His "motives" were to avoid years of "inadequate, unrewarding procedure" (R. 307). He knew that the transcripts were the only source from which defendants could get needed information which plaintiff had and which defendants lacked and that resort to depositions of 28 to 30 witnesses would be not only wasteful, but inadequate, in a case of this kind.

Thus, with respect to this litigation not only are there no policy considerations militating against disclosure of the transcripts, but the objective of securing the efficient and fair administration of this case was advanced by the court's order for production.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees.*

On Appeal From the United States District Court for the District of New Jersey

---

BRIEF OF APPELLEE, THE ASSOCIATION OF AMERICAN SOAP & GLYCERINE PRODUCERS, INC.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the statutory provisions, and the provisions of the Federal Rules of Civil Procedure, set forth on pages 2 to 5, inclusive, of the Appellant's Brief, the following Constitutional provisions and provisions of the Federal Rules of Civil Procedure are pertinent:

CONSTITUTIONAL AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgments below should be affirmed without considering the merits on the ground that the judgments were invited and consented to by plaintiff.

If the propriety of the order directing the production of the grand jury transcripts is to be reviewed, the judgments below should be affirmed on the ground that the District Court did not abuse its discretion in ordering disclosure of the grand jury transcripts.

Dated: April 11, 1958.

Respectfully submitted,

KENNETH C. ROYALL,
Royall, Koegel, Harris & Caskey,
100 Broadway
New York 5, N. Y.

CHARLES SAWYER,
Taft, Stettinius & Hollister,
603 Dixie Terminal Building
Cincinnati 2, Ohio

RICHARD W. BARRETT,
Dinsmore, Shohl, Dinsmore & Todd,
Union Central Building
Cincinnati 2, Ohio

Attorneys for Appellee,
The Procter & Gamble Company

Of Counsel:

FREDERICK W. R. PRIDE

H. ALLEN LOCHNER

New York, N. Y.

"unless the plaintiff on or before August 24, 1956 [date set in order of July 23] produced . . . the aforesaid transcripts . . . the Court will enter an order dismissing the complaint herein."

Thereafter, the Court directed a letter dated September 6, 1956 (R. 361), to counsel, in which he stated that if the plaintiff had not produced as directed "within the last paragraph of the amended order" the Court would "enter an order dismissing the complaint as provided in the amended order." In reply to this letter, the Court was advised by the plaintiff (R. 362), and by counsel for the defendants (R. 363, 364, 365, 366-367), that the transcripts had not been produced. Thereupon, the Court entered judgments, dated September 13, 1956, dismissing the case (R. 325-328).

SUMMARY OF ARGUMENT

I. *Since the Judgments Of Dismissal Were Procured By Plaintiff, This Appeal Should Be Dismissed Or The Judgments Affirmed.* The orders of July 23, 1956, granting the Association's and other defendants' motions to produce (R. 265, 262, 263, 267) were merely interlocutory orders, and therefore were not appealable. The orders only directed the plaintiff to produce, and contained no provisions concerning non-compliance. Since, at the time the orders were entered, plaintiff had emphatically stated that it would not comply with the orders, and was adhering to that position at the time it moved for and procured the amended order providing that if plaintiff did not produce by August 24, 1956, the complaint would be dismissed, the Court, in entering the dismissal orders, was doing nothing more than what the plaintiff had expressly moved for and requested. It is, therefore, clear that the dismissal of the suit was entirely voluntary on the part of the plaintiff, and that it was procured at its request and consent. The law is firmly settled that this Court will not consider an

Office - Supreme Court, U.S.
FILED
APR 14 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees.*

On Appeal From the United States District Court for the District of New Jersey

BRIEF OF APPELLEE, THE ASSOCIATION OF AMERICAN SOAP & GLYCERINE PRODUCERS, INC.

JAMES T. WELCH
SHELBY FITZE
Counsel for Appellee, The Association of American Soap and Glycerine Producers, Inc.

Of Counsel:

DAVIES, RICHBERG, TYDINGS, LANDA & DUFF
1000 Vermont Avenue, N. W.
Washington 5, D. C.

appeal from a voluntary non-suit, or an order obtained at the request or with the consent of the appellant.

II. *The Trial Court Did Not Abuse Its Discretion In Directing Production Of The Grand Jury Transcripts.* The record in this case overwhelmingly shows that plaintiff used the Grand Jury transcripts extensively in the preparation of this civil case, not only in the pre-complaint stage, but also in preparation for trial.

The use of the Grand Jury by the plaintiff as a pre-complaint civil discovery device, and the utilization of the transcripts to prepare for trial, are wholly inconsistent with the traditional purposes of the Grand Jury. Historically, the basic purpose of the English Grand Jury was the protection of the citizen against unfounded accusation, and to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. The Fifth Amendment of the Constitution of the United States adopted the Grand Jury as it existed at common law at the time that it was adopted, thereby making it a fundamental law of the United States for the prosecution of crimes. In the furtherance of this purpose, came the policy of secrecy. It is inconceivable that the Fifth Amendment's adoption of the Grand Jury as it existed at common law contemplated its use as an *ex parte* pre-complaint and pre-trial discovery mechanism in a civil case. If the Government, in a civil case, uses information gleaned through the use of the Grand Jury, as it admittedly has in the instant case, the historical functions of the Grand Jury have been purverted and its secrecy breached

The plaintiff's only concern in this case is to maintain its preferred position. To permit it to do so would be to make the Grand Jury a pawn in a technical game, instead of respecting it as a great historical body of lay inquiry into criminal wrongdoing. If the Department of Justice uses the Grand Jury as an adjunct to the preparation of civil cases, then the Federal Rules of Civil Procedure,

which the Supreme Court has approved for the trial of civil cases, should apply. The secrecy of the Grand Jury having already been breached and disregarded by the plaintiff in this case, any question with respect to such secrecy has become moot, and the transcripts of the witnesses' testimony taken before the Grand Jury would fall within the same category as any other information in the possession of the plaintiff, which is subject to discovery. In accordance with the precepts annunciated in *Hickman* v. *Taylor*, 329 U. S. 495, the defendants should have equal use of the transcripts in order to obtain the fullest possible knowledge of the issues and facts before trial.

Independent of whether or not the plaintiff has breached the secrecy of the Grand Jury, the Federal Court may remove the seal of privacy when in the Court's discretion the furtherance of justice requires it. (*United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 233-4). Rule 6(e) of the new Federal Rules of Criminal Procedure has implicitly adopted this doctrine. However, in the present case none of the reasons for secrecy of the Grand Jury proceedings exist, inasmuch as any policy in favor of encouraging free disclosures by persons having information with respect to the commission of crimes is, at the most, only of a temporary nature. This temporary and provisional secrecy ceases when the Grand Jury has finished its duties and has either indicted or discharged the persons accused. *VIII Wigmore on Evidence, 3rd Ed.*, § 2362. Furthermore, this provisional and temporary secrecy of a witness' testimony is entirely a matter of his own privilege, and not the Grand Jurors'. VIII *Wigmore on Evidence, 3rd Ed.*, § 2362, *supra.*

The defendants' need of the transcripts in order to properly prepare their defenses has been clearly established. On the basis of the facts and circumstances in this case, the District Court found that since plaintiff is using the

INDEX

	Page
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	1
COUNTER-QUESTIONS PRESENTED	2
COUNTER-STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. Since The Judgments Of Disinissal Were Procured By Plaintiff, This Appeal Should Be Dismissed Or The Judgments Affirmed	11
1. The Dismissal of the Case Was Procured by Plaintiff	11
2. An Order Entered at the Request or With the Consent of the Appellant is Not Appealable	15
II. The Trial Court Did Not Abuse Its Discretion In Directing Production Of The Grand Jury Transcripts	19
1. The Grand Jury Secrecy Has Been Breached by the Plaintiff	19
(a) The Use of the Grand Jury Proceedings by the Plaintiff as a Pre-Complaint Civil Discovery	20
(b) The Admitted Practices of the Department of Justice of Using the Grand Jury as a Pre-Complaint Discovery Device in Civil Cases	23
(c) Plaintiff's Use of the Transcripts to Prepare for, and During, Trial	25
(d) The Use by the Plaintiff of the Transcripts Breached the Grand Jury Secrecy	27

ranscripts containing relevant evidence, and since equal se of the transcripts by defendants would give them the ullest possible knowledge of the facts before trial, and ince none of the reasons for the rule of secrecy applies, he ends of justice require their production. Such ruling, nder the principles established by this Court, was wholly ithin the Trial Court's discretion, and should not be dis- urbed unless it was clearly *per se* reversible error.

ARGUMENT

I

INCE THE JUDGMENTS OF DISMISSAL WERE PROCURED BY PLAINTIFF, THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENTS AFFIRMED

1. The Dismissal of the Case Was Procured by Plaintiff

The jurisdictional question presented by this appeal is hether the plaintiff may appeal from an order which the laintiff, itself, had moved for and procured.

The order of July 23, 1956, granting the Association's otion to produce (R. 265) was merely an interlocutory rder, and, therefore was not appealable. *Alexander* v. *nited States*, 201 U. S. 117; *Cogen* v. *United States*, 278 . S. 221; *Cobbledick* v. *United States*, 309 U. S. 323, 325- 6; *Pennsylvania R. Co.* v. *Kirkpatrick*, 3 Cir., 1953, 203 . 2d 149, 150; *Bank Line* v. *United States*, 2 Cir., 1947, 3 F. 2d 133, 136; *Apex Hosiery* v. *Leader*, 3 Cir., 1939, 2 F. 2d 702; *R. D. Goldberg Theater Corp.* v. *Tri-States heater Corp.*, D.C.D. Neb. 1944, 119 F. Supp. 521, 523.

Identical orders were entered at the same time with spect to the three manufacturing defendants (R. 262, 3 and 266). It is to be observed that the orders only rected the plaintiff to produce, and contained no provision ncerning non-compliance.

Page

2. Since Considerations of Secrecy Have Been Removed by the Plaintiff, Defendants Are Entitled to Inspect and Copy the Grand Jury Transcripts 34

3. The Grand Jury's Secrecy May be Removed by the Court if the Ends of Justice Require It 38

4. The Court Below Properly Found That the Ends of Justice Required Production of the Grand Jury Transcripts 43

CONCLUSION 49

CASES: CITATIONS

Alexander v. *United States*, 201 U.S. 117 11
Alltmont v. *United States*, 177 Fed. 2d 971, cert. den. 339 U.S. 967 ..... 45, 46
Anti-Fascist Committee v. *McGrath*, 341 U.S. 123 ..18, 37
Apex Hosiery v. *Leader*, 3 Cir., 1939, 102 F. 2d 702 .. 11
Atwell v. *United States*, 4 Cir., 162 Fed. 97 38
Ballot v. *United States*, 1 Cir., 1909, 171 Fed. 404 15, 16, 17
Bank Line v. *United States*, 2 Cir., 1947, 163 F. 2d 133 ..... 11, 18
Bingle v. *Liggett Drug Co.*, D.C. Mass. 1951, 11 F.R.D. 593 36
Blair v. *United States*, 250 U.S. 273 29
Bowman Diary Co. v. *United States*, 341 U.S. 214 .. 16
Carlson v. *United States*, 209 Fed. 2d 209 32
Cobbledick v. *United States*, 309 U.S. 323 ..... 11, 32
Cogen v. *United States*, 278 U.S. 221 11
Costello v. *United States*, 350 U.S. 359 ..... 28, 29
Curry v. *Curry*, App. D.C., 1935, 79 F. 2d 172 16
Cybur Lumber Co. v. *Erkhart*, 5 Cir., 1918, 247 Fed. 284 16
Doggett v. *Hunt*, 5 Cir., 1952, 199 F. 2d 152 15

Page

Evans v. *Phillips*, 4 Wheat. 73 15
Ex Parte Bain, 121 U.S. 1 ..... 27, 28, 29
Falcon Industries v. *R. S. Herbert Co.*, D.C. N.Y. 1954, 15 F.R.D., 394 36
Fernandez v. *Carrasquillo*, 1 Cir., 1944, 146 F. 2d 204 15
Francisco v. *Chicago and A. R. Co.*, 8 Cir., 1906, 149 Fed. 354 15
Hale v. *Henkel*, 201 U.S. 43 32
Hickman v. *Taylor*, 329 U.S. 495 ..... 10, 36, 37, 43, 45, 46
In Re April 1956 Term Grand Jury, 239 Fed. 2d 263 ..... 29, 32, 33
In Re Bullock D.C. D.C. 103 F. Supp. 639 38
In Re Grand Jury Proceedings, D.C. E.D. Pa. 4 F. Supp. 283 38
In Re National Window Glass Workers, 287 Fed. 219 32
International Carrier-Call and Tel. Corp. v. *Radio Corp.*, 2 Cir., 1944, 142 F. 2d 493 15
Jencks v. *United States*, 353 U.S. 657 38
Karlsson v. *Wolfson*, D.C. Minn. 1956, 18 F.R.D. 474 36
Kelly v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 1936, 86 F. 2d 296 15
Leonia Amusement Corp. v. *Loew's, Inc.*, D.C. N.Y. 1954, 16 F.R.D. 583 36
Marks v. *Leo Feist, Inc.*, 2 Cir., 1925, 8 F. 2d 460 .. 15
Metzler v. *United States*, 9 Cir., 64 F. 2d 203 38
Morgan v. *United States*, 304 U.S. 1 36
Olson Transportation Co. v. *Socony-Vacuum Oil Co.*, D.C. E.D. Wisc. 1944, 7 F.R.D. 134 36
Pacific R.R. v. *Ketchum*, 101 U.S. 289 15
Pennsylvania R. Co. v. *Kirkpatrick*, 3 Cir., 1953, 203 F. 2d 149 11
R. D. Goldberg Theater Corp. v. *Tri-States Theater Corp.*, D.C.D. Neb. 1944, 119 F. Supp. 521 11
Royal Exchange Assur. v. *McGrath*, D.C. N.Y. 1952, 13 F.R.D. 150 36

when in actual service in time of War or public danger; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

FEDERAL RULES OF CIVIL PROCEDURE, 28 USC.

Rule 41. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof

(1) By Plaintiff; by Stipulation.

* * * * *

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

COUNTER-QUESTIONS PRESENTED

1. The jurisdictional issue presented is whether, when the District Court ordered the plaintiff to produce certain documents and subsequently, upon the motion of the plaintiff, ordered that upon the failure of the plaintiff to make such production; the case would be dismissed, the plaintiff has a right to appeal from an order of dismissal entered after the plaintiff refused to produce.

In the event this appeal is not dismissed or affirmed on the foregoing point; the following question is presented:

2. Did the Trial Court, under the facts and circumstances of this case, abuse its discretion in directing the plaintiff to permit the defendants to inspect and copy the transcripts of the testimony of witnesses who testified before the

Grand Jury which had investigated the very conduct upon which the instant civil case was predicated and where the plaintiff conceded that it had used the transcripts in the institution and preparation of this civil action.

COUNTER-STATEMENT OF FACTS

A Grand Jury sitting in the District of New Jersey from May 1951 until November 25, 1952, investigated possible violations of the antitrust laws in the soap and synthetic detergent industry. The firms under investigation included the four defendants in this civil action: The Procter & Gamble Company ("Procter"), Colgate-Palmolive Company ("Colgate"), Lever Brothers Company ("Lever"), and the Association of American Soap and Glycerine Producers, Inc. ("Association"). No indictment was returned, but sixteen (16) days later, on December 11, 1952, the United States filed a civil suit against these defendants, charging that since 1926 the defendants had conspired to restrain and monopolize interstate commerce in the production and sale of household soap and household synthetic-detergents in violation of Secs. 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 & 2), and that defendants Procter, Colgate and Lever had monopolized that commerce (R. 1-16).

The complaint was broad and complex, covering every phase of the production and sale of household soap and household synthetic-detergents, as well as with respect to the production and sale of the principal materials used in soap and synthetic-detergents, together with certain by-products, derived from the manufacture of soap, such as glycerine. The only affirmative allegation concerning the activities of the Association defendant is that appearing in paragraph 34-C of the complaint:

> "C. The defendant Association has assisted the other defendants in doing the things described in paragraphs 34-A and 34-B of this complaint."

At the time the suit was filed, the Department of Justice issued a Press Release in which it was stated (R. 482):

> "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings. (pp. 2-3)
>
> "In view of these and other factors, further criminal prosecution of defendants would not be effective in achieving the objectives of the Sherman Act." (p. 4).

After the filing of the case, plaintiff made several motions for the production of records, including three (3) omnibus motions involving tens of thousands of documents (R. 48-52, 78-88, 92-105, 106-117).

The first motion made by the plaintiff, filed March 6, 1953, was for an order requiring Procter to produce about 800 documents. These documents were identified by numbers placed upon them by Procter when the documents had been previously produced under Grand Jury subpoenas (R. 50-51, 58).

Attached to the plaintiff's omnibus motions to produce, were affidavits of Joseph E. McDowell, stating that the plaintiff considered its motions as requests for supplementary discovery to add to information previously obtained (R. 90, 104, 117).

Shortly after the discharge of the Grand Jury, the Government's attorney, who conducted the Grand Jury proceeding, in reply to an inquiry as to what happened, stated: "I can't say what happened. I am not unhappy." (R. 54, 387). The same attorney, during a hearing before the Court on plaintiff's first motion to produce, refused to answer the Court's question whether or not he presented the evidence to the Grand Jury "with a view to getting an indictment." (R. 54-55). Later, in an affidavit attached to a supplemental brief of the Government in

support of its motion to produce, the plaintiff's attorney stated (R. 402):

> "(2) That he was authorized and instructed by his superiors in the Department of Justice to carry on a complete investigation of those engaged in the production, processing, distribution, purchase and sale of soap, other detergents or materials used in their manufacture, so that a determination could be made as to whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them or of any other Federal antitrust laws, and as to what action should be taken in performance of the duties of the Attorney General and of the Department of Justice to enforce those laws through criminal or civil proceedings of both;
>
> "(3) That the investigation and all proceedings incident thereto, including the grand jury proceeding in the District of New Jersey in which subpoenas duces tecum addressed to the Procter & Gamble Company were issued, were carried on pursuant to and within those instructions; * * *"

On November 25, 1955, the Association filed a motion for an order directing the plaintiff to produce the testimony of all of the witnesses who testified before the Grand Jury (R. 128-131). In support of this motion, the Association set forth, specifically and in detail, the relevancy of the transcripts and the reasons for the Association's need for them in the preparation of its defense in this case. Similar motions were made by the other defendants (R. 118-120, 113, 134-135).

During the oral arguments on the foregoing motions, the Trial Court asked Mr. McDowell, plaintiff's attorney, the following questions (R. 139, 209):

> "* * * (a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial."

The plaintiff's attorney preferred to discuss the matter with his superiors before answering the question (R. 199), and the Court was subsequently advised by letter (R. 360) that:

> "The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

However, at a later date, during the oral arguments on plaintiff's motion to reconsider, the plaintiff's attorney stated (R. 274):

> "And may I say, your Honor, before going on, that I regret very much any failure or inadvertence on my part which may have given any impression that the Government seeks, or has sought in any way to conceal the use made of the grand jury transcripts in connection with this proceeding. I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but what the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain and prevent violations."

The Court, in its opinion of April 17, 1956, granting defendants' motions to produce (R. 206-218), found (1) that the plaintiff had used and would continue to use the transcripts while preparing for trial; (2) that the transcripts were relevant to the issues in the case; (3) that the defendants would be aided by such production, and that the equal use of the transcripts by defendants would give them the fullest possible knowledge of the facts before

the trial; and (4) that since none of the reasons for the rule of secrecy applied, the ends of justice required their production. The Court attached an Appendix (R. 218-239), showing the size of the case and some of the complex questions involved in its proper administration.

Plaintiff's motion to reconsider, and claim of privilege (R. 247-248) was denied (Court's opinion dated July 9, 1956, R. 257-262), and on July 23, 1956, the Court entered orders directing the plaintiff to produce the transcripts within thirty (30) days from the entry of the orders (R. 262-267).

At the time the orders for production were entered, plaintiff announced to the Court that plaintiff would not produce (R. 330, 331), and prior to the expiration of the thirty (30) day period, filed a "Motion to Amend or Stay Order of July 24, 1956" (R. 317), attaching a "Proposed Amended Order" (R. 318), together with an affidavit of the Attorney General (R. 319), and a brief (R. 320-322). The defendants, while stating that the order of July 23, 1956, was a proper and sufficient order at that stage of the proceedings, did not oppose the order (R. 334).

The reasons given by plaintiff for requesting the proposed amended order were that (Affidavit of Herbert Brownell, Jr.—R. 319):

> "* * * it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

Accordingly, the Court, on August 21, 1956, entered the amended order requested by the plaintiff (R. 322). This order provided that:

At the time the orders of July 23 were entered, the plaintiff stated that it would not produce (R. 330):

> "Mr. McDowell: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered."

Counsel for defendants then stated that since the order provided for production within thirty days, the defendants would wait until the expiration of that time before taking further steps under the rules as may be advisable in the event the Government adhered to its position (R. 330).

However, the plaintiff thereupon announced that the thirty-day provision would make no difference; that the Government would not produce (R. 330):

> "May I say, Your Honor, with respect to the thirty-day matter, we agreed to the inclusion of the provision for thirty days at the request of the defendants, but that it makes no difference to the position of the Government. I was instructed to state that the Government will respectfully decline to produce them."

The Court, addressing its remarks to the defendants, then stated (R. 331):

> "We will wait for thirty days, is that right?"
>
> * * * *
>
> "At which time you shall take such action as you deem necessary under the circumstances."

From this moment on, the orders that followed were at the behest, and upon the motion, of the plaintiff.

Prior to the expiration of the thirty-day period the plaintiff, on August 16, 1956, filed its "Motion To Amend Or, Alternatively, To Stay Order Of July 24, 1956" (R. 317), attaching a "Proposed Amended Order" (R. 318) which provided that:

> "unless the plaintiff on or before August 24, 1956 [date set in order of July 23] produces . . . the afore-

> said transcripts . . . the Court will enter an order dismissing the complaint herein."

The reasons given by plaintiff for requesting the proposed amendment order were that (Affidavit of Herbert Brownell, Jr., R. 319):

> ". . . it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

Shortly thereafter, on August 21, 1956, a hearing was had on the foregoing motion, at which time the defendants stated that while the original order dated July 23, 1956, was a proper and sufficient one at that stage of the proceedings, "the plaintiff's proposed relief of production or dismissal does not seem to be a relief" which defendants could oppose (R. 334, 335). Accordingly, such amended order was entered on August 21, 1956 (R. 322).

Since the plaintiff had previously emphatically stated that it would not comply with the Court's order of July 23, and was adhering to that position at the time it procured the amended order on August 21, it can hardly be gainsaid that the effect of the order, as well as the obvious purposes of the plaintiff in procuring it, was the dismissal of the case. Neither the Court, nor the defendants, had anything to do with the procurement of the order. The Court merely entered it upon the motion and request of the plaintiff, while the defendants interposed no objections. The mere formality of waiting three more days before the Court, *in accordance with the amended order, entered at the request of the plaintiff*, would dismiss the case, did not in any manner add to the order of August 21, for that order had predetermined that the case would be dismissed.

The specious argument advanced by the plaintiffs that "*the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith*" (Plt. Brief 12, 21) is clearly exposed by the fact that the Court had never even so much as intimated that dismissal would be the penalty for non-compliance. The plaintiff, itself, had requested *that* in its amended order. The Court, in its letter to counsel, of September 6, 1956 (R. 361), stated that if the plaintiff had not produced as directed "*within the last paragraph of the amended order*", the Court would "*enter an order dismissing the complaint as provided in the amended order*". The judgments of September 13, 1956, dismissing the case (R. 325-328), all recited that they were based on the record on the case, which necessarily included the amended order procured by the plaintiff.

Thus, the Court in entering the dismissal orders was doing nothing more than what the plaintiff had expressly moved for and requested. Throughout its brief plaintiff recurrently refers to the Government's "suggestion" (Plt. Brief pp. 12, 20, 22, 29, 30). In fact the plaintiff never made any "suggestion". It filed a formal motion, fortified by an affidavit of the Attorney General, together with a brief, moving the Court to dismiss the action if it did not produce, all the while adamantly proclaiming that it would not produce. Under such circumstances, plaintiff cannot effectively say that "The decision thus to amend the order was made by the Court, not by the Government" (Plt. Brief p. 22). If the plaintiff had said "I am not going to produce; dismiss the case", there would have been no question but that it procured the dismissal. It is submitted that, in effect, there is no difference in the plaintiff's stating "I am not going to produce; dismiss the case on August 24, if I do not." That was the situation in the instant case.

It is clear, and the plaintiff does not claim to the contrary, that the defendants did not move under Rule

41(b) of the Federal Rules of Civil Procedure for an involuntary dismissal for failure of the plaintiff to comply with any order of the Court. It is equally clear that the Court below did not move, *sua sponte*, under the same rule. The only remaining two methods of obtaining dismissal would be (1) under 41(a)(1) (i) by the plaintiff without order of Court before service by the adverse party of an answer or motion for summary judgment, or (ii) by filing a stipulation of dismissal filed by all parties who have appeared in the action; or (2) under Rule 41(a)(2), at the plaintiff's instance upon order of the Court. Inasmuch as 41(a)(1), (i) and (ii) are not applicable, the order must have been procured under 41(a)(2), as it actually was.

2. An Order Entered at the Request or With the Consent of the Appellant Is Not Appealable

It is a firmly settled and recognized principle that this Court will not consider an appeal from a voluntary nonsuit or an order obtained at the request or with the consent of appellant. The reasons generally given are that the appellant cannot be heard to object to what he agreed, and he is estopped from convicting the Trial Court of an error which he requested it to commit. *United States* v. *Evans*, 5 Cranch 280; *Evans* v. *Phillips*, 4 Wheat. 73; *Pacific R. R.* v. *Ketchum*, 101 U. S. 289, 295; *Water-Works Co.* v. *Barret*, 103 U. S. 516, 517; *United States* v. *Babbitt*, 104 U.S. 767, 768; *Francisco* v. *Chicago and A. R. Co.*, 8 Cir., 1906, 149 Fed. 354, 355; *Ballot* v. *United States*, 1 Cir., 1909, 171 Fed. 404, 405; *Rudolph* v. *Sensener*, C.A.D.C., 1912, 39 App. D.C. 385; *Marks* v. *Leo Feist, Inc.*, 2 Cir., 1925, 8 F. 2d 460, 462; *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 1936, 86 F. 2d 296, 297; *Fernandez* v. *Carrasquillo*, 1 Cir., 1944, 146 F. 2d 204; *International Carrier-Call and Tel. Corp.* v. *Radio Corp.*, 2 Cir., 1944, 142 F. 2d 493, 494; *United States* v. *All American Airway, Inc.*, 9 Cir., 1950, 180 F. 2d 592; *Doggett* v. *Hunt*, 5 Cir., 1952, 199 F. 2d 152; *Stewart* v. *Lincoln-Douglas Hotel Corp.*,

7 Cir., 1953, 208 F. 2d 379, 381; *Cybur Lumber Co.* v. *Erkhart*, 5 Cir., 1918, 247 Fed. 284; *Curry* v. *Curry*, App. D.C., 1935, 79 F. 2d 172, 174; *United States* v. *Star Construction Co.*, 10 Cir., 1951, 186 F. 2d 666, 669.

The dismissal in the instant case was part of a plan on behalf of the plaintiff to obtain certain benefits, or to be relieved of certain consequences that might conceivably follow its refusal to produce. Under Rule 37(b) of the Federal Rules of Civil Procedure, the Court had the choice of numerous remedies. The plaintiff, apparently not wanting to be restricted, preferred to dismiss the case, and moved for an amended order to that effect. The statement that "it would be unseemly for the chief law enforcement officer of the United States" not to comply with the orders of the Court, is not very convincing. Plaintiff had already stated in open court that it would not do so. Such considerations of unseemliness have not been observed before. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462. Neither by the mere expediency of stating at the time a consent order is entered or a nonsuit taken, that the party intends to seek review, may the right of appeal be established or reserved. *United States* v. *Babbitt*, 104 U. S. 767, 768; *Ballot* v. *United States*, 1 Cir., 1909, 171 Fed. 404, 405.

Babbitt v. *United States*, *supra*, involved the question whether in the computation of longevity pay for an officer in the Army his period of service as a cadet at West Point was to be taken into account. The Court decided it was not, but a *pro forma* judgment was rendered with the consent of the Attorney General in favor of the complainant. This is stated to have been done because the case was one of a class, and the claimant, if judgment had gone against him, could not appeal. Mr. Chief Justice Waite, in delivering the opinion of the Court, said (768):

> "In *Pacific Railroad* v. *Ketchum* (101 U.S. 289), we decided that when a decree was rendered by consent,

> no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion, this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of."

In *Ballot* v. *United States, supra*, the records showed that the consent was given "to expedite the final decision of the issue at bar". The Court in dismissing the appeal, said (405):

> "If we hear this appeal, we disregard the statute establishing this court, which constituted it for this purpose an appellate tribunal; and substantially we would act as a court of first instance. This is not only not allowable according to the rules of law, but, if accepted as a precedent to be followed, would naturally result in a constantly widening departure from what the statute contemplates, throwing on this court a burden which it is not proper for it to assume. Therefore the appeal must be dismissed."

It may be true, as stated by the plaintiff (Plt. Brief pp. 21-22), that *if* the production order as originally entered had provided for dismissal in the case of non-complaince, or *if* after non-compliance the Court had dismissed on its own motion (citing: *United States* v. *Cotton Valley Operators Committee*, 339 U.S. 940; *United States* v. *Zucca*, 351 U.S. 91), the Government could appeal such involuntary dismissal. In suggesting such a possibility, the plaintiff tacitly acknowledges the fact that the Court in the instant case did not dismiss on its own motion, and hence that the dismissal was *not* involuntary. This case is not concerned with what the Court below might have done. In addition to the ones suggested above, it might have done many other things, short of dismissal. The point is that the Court took no action on its own motion. What it did was in accordance with the amended order procured by the plaintiff.

The case of *Thomsen* v. *Cayser*, 243 U. S. 66, upon which the plaintiff relies (Plt. Brief pp. 23-27), is inapplicable

and clearly distinguishable. There the Court of Appeals had already considered and reversed the case on its merits. There were no remaining issues to be further considered, and the functions of the Appellate Court had ended insofar as that stage of judicial process was concerned. Rather than have the case remanded for a new trial, the plaintiff elected to stand on the record and take an appeal. In such a situation it is quite obvious that the plaintiff did not consent to a judgment against them, for the judgment on the merits had already been entered by the Court of Appeals.

The present appeal presents an entirely different situation. Here there is no judgment on the merits, but merely an order of the Trial Court on a procedural matter arising during the pre-trial stage of the case. The plaintiff, being dissatisfied with the Court's ruling, and proclaiming that it would not obey it, moved for and procured an amended order providing that if plaintiff did not obey, the case would be dismissed. It cannot logically or legally contend that the line of cases represented by *Thomsen* v. *Cayser, supra,* has any application to the facts in this case.

The Government, as a litigant, is bound by, and subject to, the same rules of conduct and procedure as any other litigant. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 177; *Bank Line* v. *United States,* 2 Cir., 1947, 163 F. 2d 133, 138. The device adopted by the Government, if successful, would permit any plaintiff who is dissatisfied with an interlocutory order to obtain an immediate review merely by procuring an amended order stating that the case would be dismissed if the plaintiff did not obey by a set date. It is respectfully submitted that such a practice would be contrary to the established principles heretofore followed by the Federal Courts.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIRECTING PRODUCTION OF THE GRAND JURY TRANSCRIPTS

The substance of the plaintiff's argument under its proposition II. that "The District Court Erred in Directing Production of the Grand Jury Transcript" is that the appellees failed to show "good cause". The plaintiff has, apparently, abandoned its "Claims of Privilege" interposed by the Attorney General (R. 248),[1] the filing of which the plaintiff previously insisted "properly invoked the privilege against disclosure of executive papers" (p. 8 of Jur. Statement), and now relies wholly upon the contention that a "disclosure of Grand Jury testimony may be ordered in a civil case only upon the most compelling showing of necessity" (Plt. Brief p. 44). Hence, the plaintiff attempts to rewrite the phrase "good cause", provided in Rule 34 of the Federal Rules of Civil Procedure, to read "the most compelling showing of necessity", and while the plaintiff technically abandons its claim of privilege, it makes substantially the same argument, and relies upon the same cases, as it did under the claim of privilege. That such a criterion is wholly inapplicable and foreign to the facts and circumstances in this case, and that the District Court properly ordered the production of the transcripts of testimony of witnesses taken before the Grand Jury, is clearly demonstrable.

1. The Grand Jury Secrecy Has Been Breached by the Plaintiff

The record overwhelmingly shows that the plaintiff has used the Grand Jury proceedings extensively in the preparation of this civil case, not only in the pre-complaint stage, but subsequent to the filing of the suit. The plaintiff also admits that it intends to use the Grand Jury transcripts in the further preparation of trial.

---

[1] See plaintiff's brief, page 31, footnote 13, where the plaintiff states: "We are not here arguing that the transcript is privileged against disclosure, but only that appellees have not shown good cause for its production. But see note 16 *infra* p. 33."

(a) The Use of the Grand Jury Proceedings by the Plaintiff as a Pre-Complaint Civil Discovery

Prior to the filing of this civil action by the plaintiff charging the Association and others with violations of Sections 1 and 2 of the Sherman Act (15 USC 1 & 2), a Federal Grand Jury sitting in Newark, New Jersey, from May, 1951 to November 25, 1952, investigated possible violations of the anti-trust laws in the soap and synthetic detergent industry. The Grand Jury returned no indictments but shortly after its discharge, the Government's attorney, in reply to an inquiry as to what had happened; stated: "I can't say what has happened. I am not unhappy." (R. 54, 387).

On December 11, 1952, slightly more than two weeks later, with Thangsgiving intervening, the United States filed this civil action. The broad, complicated, and extensive scope of the complaint, covering every phase of the production and sale of household soap and household synthetic detergents, as well as the production and sale of the principal materials used in soap and synthetic detergents, together with the sale and production of glycerine, was co-extensive with the sweeping and comprehensive investigation of the Grand Jury in its deliberations of eighteen (18) months duration.

This is shown by the affidavit of plaintiff's attorney to a motion, dated August 20, 1954, "For Discovery and Production of Documents Under Rule 34", in which it was stated that the motion was designed to secure material "supplementary" to that secured by the Grand Jury subpoenas. The affidavit of Joseph E. McDowell, sworn to on August 20, 1954, states (R. 90, 91):

> "* * * With minor exceptions, all of these [documents sought by the motion] are either supplementary to documents and records previously furnished by the Company, or relate to matters with respect to which substantial information has already been furnished by the Company and the other defendants herein in

> the course of the investigation of the soap and synthetic detergent industry conducted by the Department of Justice prior to the institution of this action."[2]

Necessarily, the complaint must have been in the course of preparation many months prior to the discharge of the Grand Jury, during which time the Government was utilizing for such purpose the testimony of witnesses who appeared before the Grand Jury, as well as the documents which had been secured from the defendants in this case through Grand Jury subpoenas. Unquestionably, the complaint was based upon the Grand Jury investigation. This explains why the Government's attorney was "not unhappy". He had accomplished his ultimate and evidently sole purpose—that of securing through the subverted use of the Grand Jury a pre-complaint discovery in order to acquire information upon which to institute and prepare this civil proceeding.

On the same day that the plaintiff filed this civil case, it issued the customary press release. This press release contains the following statement (R. 482):

> "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings.
>
> * * * * * *
>
> "In view of these and other factors, further criminal prosecution of defendants would not be effective in achieving the objectives of the Sherman Act."

The first statement confesses the use of the Grand Jury in the preparation of the complaint, while the latter statement is presumably intended to imply that no indictment was requested.

---

[2] The foregoing motion was directed to defendant Colgate. Identical statements were also made in separate motions directed to Procter and to Lever. See R. 104, 117.

Indeed, this fact is tacitly admitted by the persistent refusal of the Government's attorney, Walker Smith, who presented the matter to the Grand Jury, and who later filed the civil case, to answer a question posed by the District Court in that regard. This refusal occurred in a colloquy during an oral argument before the Court below on the Government's motion for discovery and production of documents under Rule 34. The Court asked the Government's attorney several times to answer "yes" or "no" as to whether he "presented the evidence" to the Grand Jury "with a view to getting an indictment". After evading the question three (3) times, the attorney stated on the fourth time that he did not think he should answer the question (R. 54, 55). The fair inference from such adamant refusal by the Government's attorney to answer the Trial Court's question, was that the evidence was not presented with a view to getting an indictment. Shortly thereafter, in an affidavit (R. 402) attached to a supplemental brief of the Government in support of its motion to produce, the plaintiff's attorney stated:

> "(2) That he was authorized and instructed by his superiors in the Department of Justice to carry on a complete investigation of those engaged in the production, processing, distribution, purchase and sale of soap, other detergents or materials used in their manufacture, so that a determination could be made as to whether there were violations of Sections 1, 2 and 3 of the Sherman Act or any of them or of any other Federal antitrust laws, and as to what action should be taken in performance of the duties of the Attorney General and of the Department of Justice to enforce those laws through criminal or civil proceedings or both;
>
> "(3) That the investigation and all proceedings incident thereto, including the grand jury proceeding in the District of New Jersey in which subpoenas duces tecum addressed to the Procter & Gamble were issued, were carried on pursuant to and within those instructions; * * * "

Inasmuch as only civil proceedings followed the discharge of the Grand Jury, the foregoing statement clearly establishes that the Grand Jury was used as a pre-complaint civil discovery mechanism. Although it does not affirmatively appear from the statement that the institution of civil proceedings was the *sole* purpose of the Government in using the Grand Jury, the probability that it was the sole purpose was not negatived, and the Government, other than resorting to such ambiguous and general statements, has studiously and steadfastly refused to commit itself. The reason for this evasive disinclination on the part of the Government has its roots in the general practice and policy of the Department of Justice respecting the use of the Grand Jury in civil cases.

(b) The Admitted Practices of the Department of Justice of Using the Grand Jury as a Pre-Complaint Discovery Device in Civil Cases

The use of the Grand Jury as a pre-complaint civil discovery process in this case wholly coincides and is consistent with the announced policy and practices of the Department of Justice. This is evident from the sworn testimony of Hon. Stanley N. Barnes, the then Assistant Attorney General of the United States in charge of the Anti-Trust Division, before a Congressional Committee on May 12, 1955 (Hearings Before the Anti-Trust Sub-Committee of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., Part I, pages 244, 245):

> "'Finally, I suggest you may wish to consider means available to the Department for compelling production of data before a complaint has been filed in a civil procedure. At the present time in the investigation of civil matters, the Department must
>
> "'(a) depend upon the voluntary cooperation of those under investigation;
>
> "'(b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or

"'(c) make use of the grand jury.

"'Those are the alternatives.

"'From this it seems clear that the sole means for compelling pre-complaint data in civil cases is the grand jury. Some—and I refer to lawyers there primarily—have urged that such use of the grand jury constitutes an abuse of its processes.

"'Mr. Maletz. Do you agree with that position, Judge?

"'Mr. Barnes. I do not.'"[3]

It is explicit in the foregoing statement that the Department of Justice feels free as a matter of general policy and practice to use the Grand Jury for the sole purpose of civil discovery, and, in view of the facts hereinabove set forth, the fair and reasonable inference is that it followed its customary procedure in the instant case.[4] Certainly, if it did not, it was given every opportunity to deny it.

---

[3] The same philosophy was expressed by plaintiff's attorney in arguing the Government's motion to produce. See R. 221, footnote 4, where it is stated: "Plaintiff also argued that since the dependency of § 4 upon § 1, 2 and 3 requires a determination as to whether there has been a criminal violation before a civil action can be commenced under § 4, it would not be an abuse of process to undertake grand jury proceedings with the *sole* purpose of preparing for a civil case under § 4."

[4] This practice was criticized in the Report of the Attorney General's National Committee to Study the Anti-trust Laws, p. 345: "The last alternative is the grand jury. Its use where civil proceedings are contemplated from the outset cannot be justified on the purely formal ground that the Sherman Act defines a criminal offense appropriate for consideration by a grand jury, even though it may later be determined that equitable relief is more appropriate. In reality, resort to grand jury in essentially civil investigations stems from lack of an adequate civil discovery alternative.

"We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against

(c) Plaintiff's Use of the Transcripts to Prepare for, and During, Trial

The very first motion made by the plaintiff in this case utilized, and was predicated upon, information obtained through the use of the Grand Jury. This motion (R. 48) filed on March 6, 1953, was for an order requiring defendant Procter to produce certain documents for inspection and copying by the plaintiff. The documents sought, about 800 in number, were identified by numbers placed upon them by defendant Procter when they had been previously produced pursuant to Grand Jury subpoenas (R. 50-51—Opinion of May 11, 1953—R. 56 at p. 58).

This motion was followed by a series of omnibus motions by plaintiff for discovery and production of documents under Rule 34, directed to defendants Colgate, Procter and Lever, respectively (R. 78-91, 92-105, 106-117). Attached to these motions were affidavits of Joseph E. McDowell stating that the plaintiff considered its motions as requests for supplementary discovery to add to information previously obtained during the Grand Jury proceedings (R. 90, 104, 117). Thus, from the inception after the filing of the civil complaint, the plaintiff's basic instrument of attack consisted of the documents and testimony obtained through the Grand Jury.

Preliminary to the arguments of counsel on defendants' motions to produce the transcripts, the Trial Court asked Mr. McDowell, plaintiff's attorney, the following questions (R. 139, 209):

> "Mr. McDowell, do you object to submitting a detailed affidavit stating exactly (a) what use, if any, plaintiff

---

flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.

"We recognize that the Department has been handicapped and accept the Judicial Conference conclusions that present civil investigative machinery is inadequate for effective antitrust enforcement. The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails."

> has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial."

After some faltering, plaintiff's attorney stated that he would prefer to discuss the question with his superiors before undertaking an answer (R. 199). Apparently, this was done, and by letter dated December 23, 1955, the Court was advised (R. 360):

> "The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing."

The Trial Court, in a prior opinion of May 11, 1953, found that the purpose of the Grand Jury investigations was for civil as well as criminal proceedings (R. 59), and in its opinion filed April 17, 1956 (R. 206 at 212-213) expressly found that "plaintiff has used and will continue to use the transcripts while preparing for trial." These findings are confirmed by the subsequent statement made by plaintiff's attorney in his argument on motion to reconsider (R. 274):

> "And may I say, your Honor, before going on, that I regret very much any failure or inadvertence on my part which may have given any impression that the Government seeks, or has sought in any way to conceal the use made of the grand jury transcripts in connection with this proceeding. I did not understand that there was any question but what the Government had the use of the grand jury transcripts. There never has been any question but that the Government feels free, indeed obligated, to use information obtained from grand jury investigations in the preparation of civil

actions which the Government is required to bring in its sovereign regulatory capacity under a statute which, as here, requires the Government to proceed to seek to restrain and prevent violations."

(d) The Use By the Plaintiff of the Transcripts Breached the Grand Jury Secrecy

The use of the Grand Jury by the plaintiff as a pre-complaint civil discovery mechanism, and the utilization of the transcripts to prepare for trial in this case, are wholly inconsistent with the traditional purposes of the Grand Jury. Inasmuch as this appeal involves the use of the Grand Jury as an instrument of discovery in a civil case, the status of the Grand Jury in our jurisprudence is a polestar to guide us. The Fifth Amendment of the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

The Grand Jury had its origin in the common law and has existed for many hundred years. Its ancient origin and purposes were set forth by the Supreme Court in *Ex Parte Bain*, 121 U.S. 1, 10, 11, where Mr. Justice Miller quoted with approval the language of Justice Field in a charge to the Grand Jury:

> "'The institution of the grand jury * * * is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing

and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. *Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.* No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.' " (Italics supplied).

The basic purpose of the English Grand Jury was the protection of the citizen against unfounded accusation and to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. *Ex Parte Bain*, 121 U.S. 1, 10, 11; *United States* v. *Olmstead*, 7 Fed. 2d 756, 758; *Costello* v. *United States*, 350 U. S. 359, 361, 362. The Fifth Amendment of the Constitution adopted the Grand Jury as it existed at common law at the time it was adopted, thereby making it a fundamental law of the United States for the prosecution of

crimes. *Ex Parte Bain*, 121 U.S. 1, 10, 11; *Blair* v. *United States*, 250 U.S. 273, 282; *Costello* v. *United States*, 350 U.S. 359, 361, 362; *United States* v. *Olmstead*, 7 Fed. 2d 756, 758; *In Re April 1956 Term Grand Jury*, 239 Fed. 2d 263, 268. In *Costello* v. *United States*, 350 U.S. 359, 362, Mr. Justice Black, in delivering the opinion of the Court stated:

> "* * * There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. * * * Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice."

Thus, it is evident that the Fifth Amendment's adoption of the Grand Jury for use in the Federal Courts in the United States was for the historic purpose of initiating prosecutions for serious crimes. In the furtherance of this purpose, came the policy of secrecy. It is inconceivable that the Fifth Amendment's adoption of the Grand Jury, as it existed at common law, as the fundamental law of the United States for the prosecution of "capital, or otherwise infamous crime", contemplated, by the widest stretch of the imagination, its use as an *ex parte* pre-complaint and pre-trial discovery process in a civil action. Certainly, if the Government, in a civil case, uses information gleaned through the use of the Grand Jury, as it admittedly has in the instant case, it has breached the Grand Jury secrecy.

This rule was enunciated by the Court of Appeals for the Seventh Circuit in *In Re April 1956 Term Grand Jury*, 239 Fed. 2d 263. That case involved certain proceedings respecting alleged violations of the Internal Revenue laws. Government counsel obtained certain material and documents through Grand Jury subpoenas, which material, with the consent of the Grand Jury, was turned over to Treasury agents for examination. It was alleged by the

petitioners that such material was procured as evidence for civil proceedings then or thereafter pending against them. The Court, Judges Lindley, Swaim and Schmackenberg, sitting, in denouncing the use by the Government of such material in a civil proceeding, stated (p. 271):

> "* * * If these efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, *then the secrecy of the grand jury has been breached.* We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The Fifth Amendment's adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings." (Italics supplied).

The Court further pointed out that the application of secrecy to the Grand Jury proceedings is a safeguard for the Grand Jury itself (p. 271-272):

> "* * * because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings [by the government]. Otherwise such misuse of the grand jury's time and functions might in a substantial degree interfere with its investigation of crime and the return of indictments and no bills."

The Court of Appeals then observed that (p. 272):

> "It is significant that the government's counsel in their brief herein, first, do not challenge the proposition that a grand jury subpoena cannot be used for the purpose of obtaining evidence to be used in a civil proceeding; and secondly, do not disclaim an intention to use, in civil proceedings, information gleaned from

examination of the records and documents subpoenaed by the grand jury in this case."

The Court then concluded (pp. 272, 273):

"* * * we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose and specifically for any civil purpose, such as tax collection or otherwise."

* * * * *

"* * * we think it is now apparent that, as far as *civil proceedings* are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under the hereinbefore quoted provisions of the Fourth and Fifth Amendments." (Italics in original).

The foregoing case is directly in point with the instant case. Here, documents and transcripts obtained through Grand Jury proceedings were admittedly taken to the Department of Justice in Washington, and were admittedly used by various attorneys of the Department of Justice for the purpose of this civil proceeding. Through such use, as the Court above so trenchantly states, "the secrecy of the Grand Jury has been breached."[5]

The Department of Justice mistakenly considers itself to be a part of the Grand Jury, or that the Grand Jury is an agency of the Department of Justice. It further claims that the transcript of the testimony of the witnesses taken

[5] The Association does not now claim that the Department of Justice should be barred from using the information and material so obtained. It does say that it should have equal use of the transcripts.

by the Grand Jury is the property of the Department (R. 187, 188). Both claims are clearly erroneous. While the Grand Jury is, in a sense, a part of the Judicial system of the United States (*Hale* v. *Henkel*, 201 U.S. 43, 66; *Cobbledick* v. *United States*, 309 U.S. 323, 327; *United States* v. *Smyth*, 104 Fed. Supp. 283, 291; *In Re National Window Glass Workers*, 287 Fed. 219, 225; *Schmidt* v. *United States*, 115 Fed. 2d 394, 397; *United States* v. *Byoir*, 58 Fed. Supp. 273; *Carlson* v. *United States*, 209 Fed. 2d 209, 213; *United States* v. *Neff*, 212 Fed. 2d 297), its authority is derived from none of the three basic divisions of the Government, but rather from the people themselves. *United States* v. *Amazon Industrial Chemical Corporation*, 55 Fed. 2d 254, 261; *In Re April 1956 Term Grand Jury*, *supra*. Under no circumstances is it an arm of the executive.

Any idea that the Department of Justice has any "property rights" in the transcript was summarily dismissed by District Judge Hartshorne in *United States* v. *Ben Grunstein & Sons Company*, 137 Fed. Supp. 197, 202:

> "Here it should be noted that the Grand Jury is an arm of the Court, not an arm of the plaintiff, the United States Government, which in the present civil case is acting through, not the Court, but its executive arm, the Department of Justice. 'The Constitution itself makes the grand jury a part of the judicial process * * * ' Cobbledick v. U.S., 1940, 309 U.S. 323, 327, 60 S.Ct. 540, 542, 84 L.Ed. 783. *It therefore follows that, strictly speaking, defense is here seeking disclosure, not from plaintiff, but from the Court itself, which obviously should treat the parties alike in their rights to relevant testimony. It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by Hickman, supra.*" (Italics supplied).

In this connection had not the Supreme Court, in approving Rule 6(e) of the Federal Rules of Criminal Procedure, been of the opinion that the transcript of testimony before a Grand Jury was within the control of the Court, it most

certainly would not have adopted or approved this rule. Furthermore, the United States Attorney, and the attorneys empowered by the Attorney General who assist in Grand Jury proceedings, as well as the reporters who record the proceedings, discarded their executive cloaks and became officers of the Court. In *United States* v. *Smyth*, 104 Fed. Supp. 283, 291, the Court says:

> "The grand jury is an arm or agency of the court by which it is appointed. The grand jurors are officers of the court. The United States Attorney, his assistants, the United States Marshal and his deputies and bailiffs, appointed by him to guard their deliberations, and, modernly, the reporters who record their proceedings are likewise officers of the court."

Once having determined that evidence is insufficient (Application of *United-Electrical, Radio and Machine-workers of America*, 111 Fed. Supp. 858, 864) or the Grand Jury is discharged, its function ends. When it ceases to function, the Government's lawyers who assisted the Grand Jury as officers of the Court, immediately lose their relationship as such, insofar as a civil proceeding is concerned, and have no more right to the information obtained through the Grand Jury proceedings than any other party in the case. If they do use the information, they pervert the functions of the Grand Jury and breach its secrecy. *In Re April 1956 Term Grand Jury, supra.* The plaintiff's position shows that it has no real concern with Grand Jury secrecy as such, since it has already breached it, and since it is further ready to breach it during the trial when "appropriate and desirable" (R. 198). Its only concern is to maintain its preferred position in civil cases in which it has used the Grand Jury as an instrument of pre-complaint and pre-trial civil discovery. To so permit is to make the Grand Jury a pawn in a technical game, instead of respecting it as a great historical body of lay inquiry into criminal wrong-doing. If the Department of Justice uses the Grand Jury as an adjunct to the prepara-

tion of civil cases, then the Federal Rules of Civil Procedure, which the Supreme Court has laid down for the trial of civil cases should apply.

The secrecy of the Grand Jury which originally existed having already been breached and disregarded by the plaintiff in this case, any question with respect to such secrecy has become moot (*United States* v. *Byoir*, 58 Fed. Supp. 273), and the transcripts of the witnesses' testimony taken before the Grand Jury would fall within the same category as any other information in the possession of the plaintiff, which is subject to discovery.

2. Since Considerations of Secrecy Have Been Removed by the Plaintiff, Defendants Are Entitled to Inspect and Copy the Grand Jury Transcripts

Under Rule 34 of the Federal Rules of Civil Procedure, a party, upon showing good cause, is entitled to inspect and copy designated documents and papers, not privileged, "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)" in the possession of the other party. The only requirement is that such evidence be "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party," if "the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[6]

---

[6] In the Notes of Advisory Committee on Amendments to Rules (28 U.S.C.A. Rule 26, Federal Rules of Civil Procedure, pp. 171, 172) it is stated:

> "Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl* v. *Aetna Life*

It is hardly necessary to state that the testimony of the witnesses before the Grand Jury is relevant to the subject matter and issues. It is patent that the complicated and extensive scope of the complaint was co-extensive with the comprehensive investigation of the Grand Jury. It is admitted, and the Trial Court has so found, that the plaintiff has used and will continue to use the transcripts while preparing for trial. Certainly, had the testimony of the witnesses not been relevant, the witnesses would never have been called before the Grand Jury to testify, nor would the plaintiff be using the transcripts in preparation for trial. The plaintiff has never contended that the transcripts were not relevant, and of course, could not in view of its use of them.

It has been repeatedly said that Rule 34 must be liberally construed in order to further the general purposes of the

---

Ins. Co., C.C.A. 2, 1943, 139 F. 2d 469; *Mahler* v. *Pennsylvania R. Co.*, N.Y. 1945, 8 Fed. Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis* v. *United Air Lines Transportation Corp.*, Conn. 1939, 27 F. Supp. 946; *Engl* v. *Aetna Life Ins. Co.*, *supra*; *Mahler* v. *Pennsylvania R. Co.*, *supra*; *Bloomer* v. *Sirian Lamp Co.*, Del. 1944, 8 Fed. Rules Serv. 26B.31, Case 3; *Rosseau* v. *Langley*, N. Y. 1945, 9 Fed. Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co.* v. *Socony-Vacuum Co.*, Wis. 1944, 8 Fed. Rules Serv. 34.41, Case 2 ("... the Rules ... permit 'fishing' for evidence as they should."); Note, 1945, 45 Col. L. Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved."

Federal Rules. *Karlsson* v. *Wolfson*, D.C. Minn. 1956, 18 F.R.D. 474, 475; *Falcon Industries* v. *R. S. Herbert Co.*, D.C. N.Y. 1954, 15 F.R.D. 394, 395; *Royal Exchange Assur.* v. *McGrath*, D.C. N.Y. 1952, 13 F.R.D. 150, 152; *Bingle* v. *Liggett Drug Co.*, D.C. Mass. 1951, 11 F.R.D. 593, 594; particularly where the complaint alleges a conspiracy, as in this case: *Leonia Amusement Corp.* v. *Loew's, Inc.*, D.C. N.Y. 1954, 16 F.R.D. 583, 584; *United States* v. *U. S. Alkali Export Association, Inc.*, D.C. S.D. N.Y. 1946, 7 F.R.D. 256, 259; *United States* v. *Schine Chain Theatres, Inc.*, D.C. W.D. N.Y. 1942, 2 F.R.D. 425, 427; *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.*, D.C. E.D. Wisc. 1944, 7 F.R.D. 134, 136.

The new rules were designed to eliminate surprise and decisions which result from strategy. *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.*, D.C. E.D. Wisc. 1944, 7 F.R.D. 134, 136; *1 Barron and Holtzoff, Federal Practices and Procedure* (1950), Foreword, p. V; *1 Moore's Federal Practice* (1938), 4-5; *Pike and Willis, the New Federal Deposition-Discovery*, 38, Col. L. Rev. 1179 (1938). Similarly the due process clause of the Fifth Amendment incorporates as fundamental law the principles of fair play in the conduct of judicial proceedings. These principles include a "reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18, 19.

The Supreme Court has recognized that the Deposition-Discovery rules are to be given a broad and liberal construction. In *Hickman* v. *Taylor*, 329 U.S. 495, 507, the Court said:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring

into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

[8] "'One of the chief arguments against the 'fishing expedition' objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

The Federal Rules of Civil Procedure apply to the Government as a party litigant to the same degree and extent as they do to any other litigant, and the Government as a litigant "should be held to the same standards of fair dealing as we prescribe for other legal contests." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 177. See also *1 Moore's Federal Practice* (1938), 49.

The *ex parte* and one-sided pre-complaint discovery employed by the plaintiff in this case is diametrically opposed to the spirit of fair play implicit in the Federal Rules of Civil Procedure, as well as being a subversion of the Rules themselves. Not only have these defendants been denied the opportunity and right to be present and cross-examine the witnesses whose testimony the plaintiff has appropriated and used in the preparation of this case, but they are now being denied the right to even inspect or copy the transcripts of the testimony of such witnesses. This unconscionable position is in utter disregard of every basic principle of equity, equality and fair play, and exemplifies trial by battle at its very worst. If the Government elects to institute civil proceedings, it should be willing to proceed under the rules applicable to civil litigation. The opinion of the Supreme Court in the

Jencks case (353 U.S. 657) is based on the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result.

3. The Grand Jury's Secrecy May be Removed by the Court if the Ends of Justice Require It

Independent of whether or not the plaintiff has breached the secrecy of the Grand Jury, the Federal Court may remove the seal of privacy when in the Court's discretion the furtherance of justice requires it. This rule is well established and has long been recognized: *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-4; *United States* v. *White*, D.C. N.J. 104 F. Supp. 120, 121; *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 629; *United States* v. *Alper*, 2 Cir., 156 F. 2d 222, 226; *Metzler* v. *United States*, 9 Cir., 64 F. 2d 203, 206; *United States* v. *Byoir*, D.C. N.D. Tex. 58 F. Supp. 273, 275, Aff'd 5 Cir., 147 F. 2d 336, 337; *Atwell* v. *United States*, 4 Cir., 162 F. 97; *In Re Grand Jury Proceedings*, D.C. E.D. Pa. 4 F. Supp. 283, 284; *In Re Bullock*, D.C. D.C. 103 F. Supp. 639, 641. In *United States* v. *Socony-Vacuum Oil Co., supra*, the Supreme Court, after stating "Grand Jury testimony is ordinarily confidential," declared (p. 234):

> "But after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

The new Federal Rules of Criminal Procedure have implicitly adopted this doctrine. Rule 6(e) provides disclosure of matters occurring before the Grand Jury "when so directed by the court preliminary to or in connection with a judicial proceeding."

At the outset, it should be noted that the issue in the instant case involved only the transcripts of the testimony of the witnesses who appeared before the Grand Jury. It does not involve the discussions and vote of the individual

members of the Grand Jury, or any other matter in any wise connected with its deliberations.

In *United States* v. *Rose*, 3 Cir., 1954, 215 F. 2d 617, 628, the Court adopted the language of *United States* v. *Amazon Industrial Chemical Corp.*, D.C. Md. 1931, 55 F. 2d 254, 261, summarizing the reasons generally given for the rule of secrecy:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

It is apparent that only one, namely "(4)", of the foregoing reasons, could possibly have any application here, and the basis for that one has long since disappeared. At the time the Court below ordered production of the transcripts, the Grand Jury had been discharged almost 3½ years without returning an indictment, and any policy in favor of encouraging free disclosures by persons having information with respect to the commission of crimes can encompass, at the most, only a temporary secrecy. This temporary and provisional secrecy ceases when the Grand Jury has finished its duties and has either indicted or discharged the persons accused. Professor Wigmore states this principle clearly and succinctly (*VIII Wigmore on Evidence*, 3rd Ed. § 2362):

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily

against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury . . .

"But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded . . .

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused. . . ." (Italics in original)

Furthermore, it is to be observed that the secrecy of a witness' testimony is entirely a matter of his own privilege, *and not the Grand Juror's*. This fact is forceably emphasized by Wigmore (§ 2362):

"The privilege, therefore, is not the grand juror's; for he is merely an indifferent mouthpiece of the disclosure. Nor is it entirely the State's; for the State's interest is merely the move for constituting the privilege. The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the *privilege* must therefore be *that of the witness*, and rests upon his consent." (Italics in original)

Wigmore concludes:

"Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the same reasons noted in par. (1) *supra*. . . .

"There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended*, the privilege of the witnesses not to have their testimony disclosed, should be deemed to continue.

> "This is, in effect, the law as generally accepted today. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required '*whenever it becomes necessary in the course of justice.*'. Disregarding a few local exceptions this is in practice no narrower a rule than the one above deductible from principle." (Italics in original)

Indeed, the witness, himself, is under no oath of secrecy, nor may one be imposed upon him. Rule 6(e) of the Federal Rules of Criminal Procedure, while proscribing temporary and limited secrecy on the jurors, attorneys, interpreters and stenographers, specifically forbids the administering of an oath of secrecy to a witness:

> "No obligation of secrecy may be imposed upon any persons except in accordance with this rule."[7]

Even prior to the adoption of the Rules, this was the recognized law. In *United States* v. *Amazon Industrial Chemical Corp.*, D.C. Md., 1931, 55 F. 2d 254, 262, the Court said:

> "Witnesses before federal grand juries are not sworn to secrecy."

Plaintiff suggests, as an abstract matter, that Grand Jury witnesses frequently testify as informers, and that they would be less likely to do so if such testimony were to be made public (Plt. Brief, pp. 40-41). There is nothing in the record of this case to show that any of the witnesses fall within that category, nor does the plaintiff so claim. On the contrary, the plaintiff stated that all of the 28 witnesses who testified before the Grand Jury were

---

[7] The Advisory Committee's Note on Rule 6, Subdivision (e) states:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

under compulsion of subpoena (Plt. Brief, p. 41). The witnesses, therefore, could not be regarded as informers. Furthermore, the informer's privilege applies only to the identity of the informer, and where the identity is known, the privilege disappears. *VIII Wigmore on Evidence*, 3rd Ed., § 2374. Since the plaintiff says that the defendants already know the names of the witnesses, and "the government had offered to disclose the names of all Grand Jury witnesses" (Plt. Brief, p. 46), it is difficult to see how the informer's privilege could be pertinent to this case.

It has now been many years since the Grand Jury was discharged without returning an indictment. Any temporary privilege against disclosure of testimony which the witnesses that testify before the Grand Jury may have had, and which Wigmore says terminated "after the Grand Jury's functions ended", has long since expired. To hold otherwise, as Wigmore observes, "would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges." In other words, the privilege against disclosure is now non-existent. It being non-existent, not even the witness, himself, could now claim it. And it being non-existent, it is respectfully submitted that the Department of Justice cannot now claim it.

The cases cited by the plaintiff with reference to the policy of maintaining the secrecy of Grand Jury proceedings are wholly inapposite to the issues in this case, except insofar as some of them recognize the well settled doctrine that a Federal Court may remove the seal of privacy when in the Court's discretion the furtherance of justice requires it. The plaintiff does not cite a single civil case in which the Court denied production where the Government openly admits, as it does in this case, and as the Court has found, that it has used and will continue to use the Grand Jury transcripts in preparation for trial.

The basic principles are clear, and since their application is primarily dependent upon the facts and circumstances of each case to which they are applied, the question whether the ends of justice justified the District Court's ordering the plaintiff to produce the transcripts, must be viewed in the light of the facts in this case. The discussion of this question must necessarily encompass the exercise of the District Court's discretion.

4. The Court Below Properly Found That the Ends of Justice Required Production of the Grand Jury Transcripts

The bases of the District Court's opinion filed April 17, 1956, ordering plaintiff to produce the Grand Jury transcripts, were: (1) that plaintiff had used and would continue to use the transcripts while preparing for trial; (2) that the transcripts contained relevant information; (3) that the defendants would be aided by such production since equal use of the transcripts by the defendants would give them the fullest possible knowledge of the facts before trial; and (4) that since none of the reasons for the rule of secrecy applied, the ends of justice required the production. The Court further stated (R. 217-218):

> "* * * I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy. These motions were considered by me objectively and honestly by setting aside all my preconceived ideas on the subject."

In arriving at his conclusion, Judge Modarelli followed and quoted the precepts enunciated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 501, where it is stated:

> "* * * The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the

preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

Any discussion of this point must necessarily begin with an examination of the type of litigation before the Court. This antitrust civil proceeding falls directly within the category of the classification "Big Case". As the Supreme Court is well aware, there is probably no other field of litigation that affords such complex, protracted and expensive pre-trial and trial proceedings. This fact has become a source of considerable concern to the Court and counsel for the parties, as well as to the litigants, themselves.[8] As the Judicial Conference Report of September, 1951 (13 F.R.D. 61, 64), states:

"Cases of this sort, especially in the anti-trust and patent fields, while not numerous, are of sufficient frequency to create an acute major problem in the current administration of justice. Unnecessary consumption of time and energy, delay in disposition of disputes, and enormous expenditures of money are among the vices resulting from the circumstances described, but the principal vice is that such conditions create confusion, magnify uncertainty, multiply the

[8] McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27 (1950); Whitney, *The Trial of an Anti-Trust Case*, 5 Rec. Ass'n Bar City N.Y. 449 (1950); Handler, *Anti-Trust—New Frontiers and New Perplexities*, 6 Rec. Ass'n Bar City N. Y. 59 (1951); Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165 (1950); CCH, *Symposium on Business Practices under Federal Antitrust Laws* (1951); Chadwell and McLaren, *The Current Status of the Antitrust Laws*, U. Ill. L. Forum 491 (Winter ed. 1950).

possibiilties of error, and otherwise tend to make less certain and less accurate the judicial determination of disputed issues. The latter vices, if permitted to continue to exist, might threaten the judicial process itself in respect to complex controversies."

In its opinion granting the defendants' motions to compel the plaintiff to produce the Grand Jury transcripts, the Court referred to the serious, complex, and unique procedural problems involved in this case, and in the Appendix to the opinion, endeavored to convey some idea of the magnitude of the case, and complexity of the problems involved. During the oral arguments, the Trial Judge repeatedly made it clear that he was concerned with this particular "Big Case" concept—an "anti-trust suit" —and that "he did not want to make a burdensome 'Big Case' more burdensome for anybody" (R. 192, 303, 307, 310).

The practical and efficient conduct of the "Big Case" depends in a large part upon the exercise of judicial discretion. The potential range of issues, evidence, and argument, is so great and complex that this exercise of discretion by the Trial Court must, of necessity, have a wide latitude. A specific problem cannot be segregated and ruled upon, disaffected by, and without relationship to, the potential bearing it may have upon the equitable and efficient conduct of the case as a whole, both present and future. The Trial Judge, who has lived with the "Big Case" from its inception, acquires an indispensable knowledge and insight of its magnitude and complex problems, in the same manner that the trier of a case does with respect to the credibility of a witness. It was the Trial Court's considered opinion that *upon the facts in this case*, the ends of justice would be served in ordering production of the transcripts.

The plaintiff has argued at great length that since the Court in *Hickman* v. *Taylor*, 329 U.S. 495, and *Alltmont* v.

United States, 177 Fed. 2d 971, cert. den. 339 U.S. 967, held that in absence of special circumstances the "work product" of a lawyer was not subject to discovery under Rule 34, the "policy against breaching the secrecy of Grand Jury proceedings is no less strong than the privacy of a lawyer's 'work product' ". After discussing such policy it concludes that a disclosure of Grand Jury testimony may be ordered in a civil case only upon the most compelling showing of necessity.

There are a number of fatalities inherent in such reasoning. In the first place, entirely different considerations and principles are involved as between Grand Jury testimony and a lawyer's "work product". The policy of preserving the "work product" of a lawyer is a continuing one, in the absence of which, this Court stated in *Hickman* v. *Taylor*, *supra*: "The effect on the legal profession would be demoralizing". To the contrary, as has already been discussed, *supra*, and as the Court below found, none of the reasons for maintaining the secrecy of the Grand Jury transcripts apply in this case. It is not claimed that the Grand Jury testimony is the "work product" of the plaintiff, although this claim appears to have been obliquely intimated in plaintiff's brief at page 38, note 17. However, the point was not pressed, nor do the authorities cited support the text. Any intimation that Grand Jury testimony is the "work product" of the plaintiff was tersely dismissed by Judge Hartshorne in *United States* v. *Ben Grunstein and Sons Co.*, 137 Fed. Supp. 197, 202:

> "It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by Hickman supra."

The "most compelling showing of necessity" doctrine advanced by the plaintiff is diametrically contrary to the spirit and purposes of the new Federal Rules of Civil Procedure. It is also contrary to the Supreme Court's construction of the Rules in *Hickman* v. *Taylor*, 329 U.S. 495,

501, 507. The language of the Court has been quoted, *supra*, but its importance would justify a partial repetition.

> "Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."
>
> * * * * * *
>
> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever he has in his possession."

The plaintiff says that its proposed "most compelling showing of necessity" has not been met here because defendants have not shown that the witnesses are unavailable, or that defendants could not interview them or take their depositions. It should be first observed that such a statement is wholly inconsistent with the plaintiff's contention that to disclose such testimony would be a breach of the Grand Jury secrecy. If each witness had such a phenomenal memory that he could recite verbatim the text of his testimony, the secrecy of the Grand Jury would be breached to the same extent as would result from a reading of the transcript. The same would be true with respect to any part of the testimony the witness could remember.

Of course, the entire idea that the defendants could secure the information through taking the depositions of the witnesses, many years after the discharge of the Grand Jury, is utterly fantastic and unrealistic. The magnitude and complexity of the subject matter of the complaint, covering every phase of the manufacture and sale of household soap and synthetic detergents, as well as the principal materials used in the manufacture of soap and synthetic detergents, would pose the impossible problem of knowing where to begin and what questions to ask. Additionally, tens of thousands of documents that

were subpoenaed by the Grand Jury would have to be examined and correlated to the particular witness, before he could be intelligently interrogated, and there would be no way of pre-determining the relevant documents. Such probing in the dark would at least be wholly inadequate, if not futile. Furthermore, after the lapse of approximately 6 years the witnesses, even if inclined to do so, could not be expected to remember more than the barest substance of their testimony, and there would be many facets concerning which they would have no independent recollection of having testified to. There would be no way of refreshing their memories.

The Court below was eminently aware of the propensity of the witness to change his story. During the oral argument on plaintiff's motion to reconsider, the Court observed (R. 302):

> "* * * I had many things in mind while I was writing this opinion, particularly since for seven years I presented cases to the grand jury in a metropolitan county, * * * I could have a witness testify this week, and I would call him the next week on the same subject and he would give me a totally different story, and if I called him the next week he would give me another story, a third version of what happened."

In *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150, 231, the memories of the witnesses were so faulty that the Government used the Grand Jury transcripts about ninety times to refresh them.

In addition to the foregoing practical considerations, the taking of depositions would impose an undue burden and great and unnecessary expense on these defendants; the delay incident to preparation, and arranging times for the taking thereof in many sections of the United States to meet the convenience of counsel, would be substantial; and the record in this case would be augmented by tens of thousand pages.

The District Court considered and weighed all of the foregoing matters, together with the numerous other factors which must be considered in the proper, just and efficient conduct of a "Big Case". It was the Court's considered judgment that the ends of justice required the plaintiff to produce the Grand Jury transcripts. Such ruling, under the principles established by this Court, was wholly within the Trial Court's discretion, and should not be disturbed unless it was clearly *per se* reversible error.

Under the facts and circumstances in this case, it is respectfully submitted that the order of the District Court directing the plaintiff to produce the Grand Jury transcripts was a proper exercise of the Court's discretion.

CONCLUSION

Since the judgments of dismissal were consented to and procured by the plaintiff, this appeal should be dismissed, or, in the alternative, the judgments should be affirmed.

In the event the appeal is not dismissed or affirmed on the foregoing point, the judgments below should be affirmed on the ground that the District Court did not abuse its discretion in ordering disclosure of the Grand Jury transcripts.

Respectfully submitted,

JAMES T. WELCH
SHELBY FITZE
Counsel for Appellee, The Association of American Soap and Glycerine Producers, Inc.

Of Counsel:

DAVIES, RICHBERG, TYDINGS, LANDA & DUFF
1000 Vermont Avenue, N. W.
Washington 5, D. C.

April 14, 1958

Office Supreme Court, U.S.
FILED
APR 14 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

On Appeal From the United States District Court for the District of New Jersey

BRIEF FOR APPELLEE LEVER BROTHERS COMPANY

ABE FORTAS
WILLIAM L. MCGOVERN
ABE KRASH
1229 19th St. N. W.
Washington 6, D. C.
Attorneys for Appellee Lever Brothers Company

Of Counsel:
ARNOLD, FORTAS & PORTER
1229 19th St. N. W.
Washington 6, D. C.

MARTIN J. PENDERGAST
390 Park Avenue
New York 22, N. Y.

April 14, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	2
Questions Presented	3
Statement	3
Summary of Argument	11
Argument	13
I. The Issue	13
II. The Government's Contentions	16
III. The District Court's Order of Dismissal Is Not Appealable	18
A. The District Court's Order Is Not Appealable Because It Is Not A Final Determination of the Controversy	18
B. The Dismissal Order Is Not Appealable Because It Was Voluntarily Invited and Procured by the Appellant	23
C. The Effect of the Dismissal	29
IV. The Merits	33
Conclusion	44
Appendix	i

CITATIONS

CASES:

Alexander v. *United States*, 201 U.S. 117	18
Apex Hosiery Co. v. *Leader*, 102 F. 2d 702 (3rd Cir. 1939)	18
Atwell v. *United States*, 162 Fed. 97 (4th Cir. 1908)	40
Attorney General v. *Pelletier*, 240 Mass. 264, 134 N.E. 406 (1922)	39

Page

Bank Line v. *United States*, 163 F. 2d 133 (2nd Cir. 1947) 42
Bingle v. *Liggett Drug Co.*, 11 F.R.D. 593 (D. Mass. 1951) 37
Bowman Dairy Co. v. *United States*, 341 U.S. 214 ... 34
Catlin v. *United States*, 324 U.S. 229 20
Central Transp. Co. v. *Pullman's Palace Car Co.*, 139 U.S. 24 25
Cobbledick v. *United States*, 309 U.S. 323 .....19, 22
Cogen v. *United States*, 278 U.S. 221 18
Cybur Lumber Co. v. *Erkhart*, 247 Fed. 284 (5th Cir. 1918) 25
Durkin v. *Pet Milk Co.*, 14 F. R. D. 385 (D. Ark. 1953) 38
Evans v. *Phillips*, 4 Wheat. 73 25
Federal Baseball Club v. *National League*, 259 U.S. 200 28
Francisco v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir. 1906) 25
Frey & Son v. *Cudahy Packing Co.*, 256 U.S. 208 ... 28
R. D. Goldberg Theatre Corp. v. *Tri-States Theatre Corp.*, 119 F. Supp. 521 (D. Neb. 1944) 18
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 .. 32
Herbst v. *Chicago Rock Island and Pacific Railroad*, 10 F. R. D. 14 (D. Iowa 1950) 37
Herzog v. *United States*, 75 S. Ct. 349 40
Hickman v. *Taylor*, 329, U.S. 495 .....35, 38
Jencks v. *United States*, 353, U.S. 657 42
Kelly v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936) 20, 25
V.O. Machinoimport v. *Clark Equipment Co.*, 12 F. R. D. 191 (D.S.D. N.Y. 1951) 20
Marks v. *Leo Feist, Inc.*, 8 F. 2d 460 (2nd Cir. 1925) 25
Metzler v. *United States*, 64 F. 2d 203 (9th Cir. 1933) 40
Panella v. *Baltimore & Ohio*, 14 F. R. D. 196 (D. Ohio 1951) 37
Parr v. *United States*, 351, U.S. 513 20
St. Louis, I.M. & S. Ry. Co. v. *Southern Express Co.*, 108 U.S. 24 21
Segurola v. *United States*, 275 U.S. 106 22
Thomsen v. *Cayser*, 243 U.S. 66 .....24, 26

Page

Thomsen v. *Union Castle Mail S.S. Co.*, 149 Fed. 933; 166 Fed. 251; 190 Fed. 536; 190 Fed. 1022 ..... 27, 28, 29, 30
United States v. *Amazon Industrial Chem. Corp.*, 55 F. 2d 254 (D. Md. 1931) 40
United States v. *Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949), aff'd 339 U.S. 940 ..... 26, 31
United States v. *Farrington*, 5 Fed. 343 (N.D.N.Y. 1881) 39
United States v. *Garsson*, 291 Fed. 646 (S.D.N.Y. 1923) 39
United States v. *General Motors*, 15 F. R. D. 486 (D.C. Del. 1954) 39
United States v. *Remington*, 191 F. 2d 246 (2nd Cir. 1951); cert. den. 343 U.S. 907 40
United States v. *Socony Vacuum Oil Co.*, 310 U.S. 150 ..... 40, 41
United States v. *Wallace & Tiernan*, 336 U.S. 793 ..... 20, 21, 22, 24, 25, 29, 30
United States v. *Zucca*, 351 U.S. 91 26

STATUTES AND RULES:

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. Sections 1, 2 and 4:

Section 1 ..... 2, 3
Section 2 ..... 2, 3
Section 4 ..... 2, 3

15 U.S.C. 29, 32 Stat. 823 ..... 18, 19, 33

15 U.S.C. 30, 37 Stat. 731 35

Federal Rules of Civil Procedure (28 U.S.C.)

Rule 34 ..... 3, 4, 6, 37, App.
Rule 37 ..... 3, 24, 31, App.
Rule 41 ..... 3, 30, 31, App.

Federal Rules of Criminal Procedure (18 U.S.C.)

Rule 6(e) ..... 3, 6, 17, 40, App.
Rule 16 40
Rule 17 ..... 34, 40

MISCELLANEOUS: Page

Comment, Pre-Trial Disclosure in Criminal Cases, 60 Yale L. J. 626 (1951) 34

Judicial Conference Reports 1951, 1952, 1953, 1954 ..5, 14

McAllister, The Big Case:

Procedural Problems In Antitrust Litigation, 64 Harvard Law Review 27 (1950) 5, 13

Moore, Commentary on the U.S. Judicial Code 502 (1949) 18

Moore's Federal Practice 37

Wigmore on Evidence §§ 2360-2361 40

Yankwich, Observations on Antitrust Procedures, 10 F.R.D. 165 (1950) 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No: 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

On Appeal From the United States District Court for the District of New Jersey

---

BRIEF FOR APPELLEE LEVER BROTHERS COMPANY

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey granting the motion of Lever Brothers Company (Lever) under Rule 34 (F.R.C.P.) to require the Government to produce the transcript of testimony before the grand jury for

inspection and copying is reported at 19 F.R.D. 122 and reprinted in the record at R. 206. The opinion of the District Court denying a motion by the Government for reconsideration and rejecting a Claim of Privilege interposed by the Attorney General is reported at 19 F.R.D. 247 (R. 257). Other opinions filed by the District Court in this proceeding are reported at 14 F.R.D. 230 (R. 56) and at 19 F.R.D. 149 (R. 73).

JURISDICTION

The judgment of the District Court dismissing the complaint was entered on September 13, 1956 (R. 327). The Notice of Appeal was filed on October 4, 1956. The jurisdiction of this Court is invoked by Appellant under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U.S.C. 29) as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989. Each Appellee filed a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss the appeal or to affirm the judgment below on the ground that the order is not appealable. On February 25, 1957, this Court entered an order postponing further consideration of the jurisdictional question pending a hearing of the case on the merits (R. 565).

STATUTES AND RULES INVOLVED

The following statutes and rules are involved in this proceeding:

(i) Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2, and 4, commonly known as the Sherman Act.

(ii) Rules 34, 37, and 41 of the Federal Rules of Civil Procedure (28 U.S.C.) as amended.

(iii) Rule 6(e) of the Federal Rules of Criminal Procedure (18 U.S.C.).

The text of the foregoing rules is set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether a party may obtain review of an interlocutory order for the production and discovery of documents entered under Rule 34 of the Federal Rules of Civil Procedure by requesting the trial court to dismiss the complaint?

2. Whether, in the circumstances of this case, the trial court abused its discretion in ordering Appellant to produce and to make available to Appellees the transcript of testimony of witnesses before the grand jury?

STATEMENT

This is an appeal by the United States (Plaintiff below) from judgments of the United States District Court for the District of New Jersey dismissing the present suit (R. 325-328). The United States instituted this civil suit under Section 4 of the Sherman Act charging violations of Sections 1 and 2 by Appellees in the soap and detergent industry. The scope of the complaint is vast, covering all phases of the industry (R. 1-16).

The complaint was filed on December 11, 1952, about two weeks after the discharge on November 25,

1952, of a grand jury which had investigated the industry for eighteen months (R. 207-208). No indictment was returned.

In the grand jury proceedings, the Government on three separate occasions caused comprehensive subpoenas to be served upon each Appellee (R. 430-431). It obtained hundreds of thousands of documents from the Appellees and from eighty-two other companies and individuals, including customers, suppliers, and competitors (R. 431, 471). About twenty-eight witnesses were examined before the grand jury; approximately ten of these witnesses were from companies other than the Appellees (R. 471-472).

After filing the civil complaint, the Government launched comprehensive discovery proceedings under Rule 34 (F.R.C.P.) In addition to the vast volume of documents and testimony before the grand jury, the Government on August 23, 1954, filed motions under Rule 34 for production by Appellees of additional hundreds of thousands of documents (R. 78, 92, 106).

Faced with the monumental task presented by the Government's initiative, and disturbed by the fact that after more than three years the Government was still engaged in discovery, the District Court (Modarelli, J., now deceased), expressed concern over the prospects that, unless effective procedural steps were taken, the defendants (Appellees) would require a similar extended period for discovery. On December 7, 1954, the Court said (R. 127):

> "One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer, how long must we wait for defendants to prepare their case?"

Acting on the basis of current discussions of procedure in the "Big Case,"[1] the Court devised "a suggested manner of procedure" to define the issues, limit the documents to be produced, and generally to expedite discovery and disposition of the case,[2] and it subsequently entered the order allowing inspection of testimony before the Grand Jury.

These procedures, which included the development of a highly interesting and promising technique of requiring the submission of Tentative Statements of Issues of Fact and Law (R. 233-234, 238), were commended by counsel for both the Government and the Appellees (R. 219).

The Government's tremendous discovery proceedings were still in process at the time of dismissal of the complaint on September 13, 1956, almost four years after the complaint was filed (R. 325-328), but the Appellees had taken action in two respects to commence their own discovery. First, on July 15, 1953, at Appellees' initiative, the Government agreed to turn over to Appellees for their inspection, many thousands of documents of third parties which had been produced before the Grand Jury, pursuant to subpoena or otherwise, where those third parties did not object (R. 70). Second, the Appellees separately

---

[1] McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harvard Law Review 27 (1950); Judicial Conference of the United States, Procedure in Antitrust and Protracted Cases, Summary of Prettyman Report and Conclusions, Judicial Conference Report, Sept. 1951, pp. 22-26; 13 F.R.D. 62 (1951); Judicial Conference Report, 1952, p. 18; Judicial Conference Report, Sept. 1953, p. 21; Judicial Conference Report, 1954, pp. 25-26.

[2] The program adopted was described in detail by the Court in the Appendix to its opinion directing production of the grand jury transcript (R. 218-239).

filed motions for orders to permit them to inspect and copy the transcript of testimony of witnesses before the Grand Jury.[3] These motions were not pressed or considered until after the Government had begun taking oral depositions in the autumn of 1955 (Gov't Br. 8-9), specifically, the deposition of Kelly Y. Siddall, an official of one of the Appellees, Procter and Gamble, who had also testified before the Grand Jury.[4]

The principal bases of Appellees' motions were as follows:

1. Access to the Grand Jury testimony was essential if Appellees were to be fully informed (R. 135). There was no adequate substitute. Depositions of the witnesses would be inadequate, particularly because the witnesses had testified in 1951-1952 as to events covering a long period of time prior thereto, and they could not be expected to recall either their testimony or the events involved upon depositions taken in 1955 or 1956, or later.

2. The Government admittedly had used the testimony and intended to use it for purposes of trial (R. 274).[5]

---

[3] Lever and Procter filed motions under Rule 34 (R. 118, 134). Colgate filed under Rule 6(e) of the Federal Rules of Criminal procedure (R. 133).

[4] Procter and Gamble had resisted Siddall's deposition unless his Grand Jury testimony was made available for inspection to avoid duplication, surprise and unfairness. See Brief on Behalf of the Procter and Gamble Company in Support of Motion to Postpone or Limit Deposition of Kelly Y. Siddall, p. 5 (not printed).

[5] At the time it filed the complaint, the Government announced: "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings" (Department of Justice Press Release, quoted by Court below, R. 211).

3. Not a single one of the Lever officials who had appeared before the Grand Jury was any longer connected with the company (R. 168, 535) and the principal Colgate witness had died (R. 473, 535).

4. Appellees' discovery and the trial of this enormous case would be greatly delayed and made more expensive if Appellees had to take the depositions of the twenty-seven living witnesses, instead of resorting to the convenient, readily available transcripts of their testimony.

On April 17, 1956, after elaborate consideration, the court granted these motions in order to avoid delay and duplication, in the interests of fairness and full, mutual discovery, and as part of sensible administration of the "Big Case" (R. 206). The court found that the "plaintiff is using the transcripts containing relevant information"; that "equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial"; and that "none of the reasons for the rule of secrecy applies" (R. 218). The trial court recognized that "there is a strong caveat against the needless intrusion" upon grand jury secrecy; that a "strong and positive showing should be required of persons seeking to break the seal of secrecy"; that disclosure would not be granted if it were "prejudicial to the public interest, useless or unnecessary"; and that the failure to allow disclosure in the circumstances of this case "would be an abuse of discretion and not in the furtherance of justice" (R. 217). Accordingly, the court concluded that "the ends of justice" required him to make the transcripts available to the defendants (R. 218).

On May 3, 1956, Appellant filed a motion for reconsideration (R. 247), together with a Claim of Privilege signed by the Attorney General (R. 248). The Attorney General claimed that "The Department of Justice holds the transcripts of grand jury testimony as a trustee for the benefit of the people. The privilege against disclosure of such transcripts is that of the government, and not of the witnesses .* * *" (R. 248). The trial court denied the motion for reconsideration and rejected the Claim of Privilege on July 9, 1956 (R. 257). The claim of privilege is not pressed by the Government in this Court (Gov't Br. 31, Note 13).

Appellees submitted proposed orders to implement the opinions directing the Government to produce the grand jury transcript (R. 241, 243, 245). These orders, identical in form (R. 330), required Appellant to produce the grand jury transcript of witnesses' testimony for copying and inspection within thirty days (*Ibid.*). The proposed orders did not specify any penalty for non-compliance.

At a hearing on July 23, 1956, before entry of these orders, counsel for the Government advised the court that the Government consented to the form of these orders (R. 329), but he stated that the Department of Justice would in no event produce the transcripts called for by the proposed order. Mr. McDowell, a Department of Justice Attorney, stated (R. 330):

> "I am instructed, Your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered".

The Court, nevertheless, entered the orders directing Appellant to produce the transcript within thirty days, i.e., on or before August 24, 1956 (R. 262-267).

Appellant, however, did not await the expiration of the thirty day period. On August 16, 1956, eight days before the deadline for compliance, Appellant filed a "Motion to Amend Or, Alternatively, To Stay [the] Order of July 24, 1956" (R. 317). Appellant tendered an amended order which provided that

> "unless the plaintiff on or before August 24, 1956 produces . . . and permits each of the defendants . . . to inspect and copy . . . the aforesaid transcripts of the testimony of witnesses who appeared before the said grand jury, *the Court will enter an order dismissing the complaint herein.*" (Emphasis supplied).

Neither the trial court nor Appellees had previously suggested that the action would be dismissed in the event of non-compliance; this proposal originated with Appellant. Appellant made clear that its sole purpose in proposing dismissal of the complaint was to enable it to appeal the production order. In support of its motion to amend the order directing discovery, Appellant submitted an affidavit by the Attorney General (R. 319) which stated that he deemed the court's rulings "erroneous" and that

> ". . . . It is my intention to seek review of that ruling in the Supreme Court of the United States."
>
> ". . . In my considered judgment, it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with

> which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

This purpose—to obtain appellate review of the discovery order without either obeying or disobeying it—was reiterated by trial counsel for the Department of Justice at the hearing on Plaintiff's Motion to Amend on August 21, 1956 (R. 331). Mr. McDowell stated (R. 332):

> "Your Honor, our motion this morning seeks to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes."

Defendants then told the Court that they did not see how they could oppose a motion for dismissal of the case against them, although they believed that the order of July 23 was a "sufficient order at this stage of the proceedings"; i.e., prior to compliance or non-compliance by the Plaintiff (R. 334).

Accordingly, the motion of the plaintiff-appellant was granted. An "Amended Order" was entered on August 21, 1956, in precisely the form requested by the Appellant, which provided that unless the Appellant produced the transcripts on or before August 24, 1956, the Court would dismiss the complaint (R. 322).

Pursuant to its program of procuring an order of dismissal so that it might obtain appellate review of the discovery order, Appellant did not produce the transcripts, and so notified the Court by letter on September 7, 1956 (R. 362). Thereupon, the Court,

on September 13, 1956, entered its orders dismissing the action (R. 325-328). This appeal is taken from these orders of dismissal.

SUMMARY OF ARGUMENT

I. The government in this case seeks review of an interlocutory discovery order entered by the trial court in administering a "Big Case". The government voluntarily engineered and obtained the dismissal order. It was under no compulsion to do so, legally or practically. The underlying discovery order which caused it to seek dismissal of the case did not prevent it from going forward with its prosecution of the case. This case, therefore, is not like *Wallace & Tiernan* or *Thomsen* v. *Cayser, infra,* upon which the Government relies, in which further proceedings were impossible or futile.

II. If the government felt that immediate review was necessary because of the importance of the issue, it could have asked for an extraordinary writ or suffered a contempt order from which appeal would lie without disrupting the litigation in the trial court. However, it voluntarily chose dismissal, and it cannot now appeal.

III. The underlying order required the Government to allow Appellees to inspect the testimony of witnesses before the grand jury which had been used by the government for an 18-month investigation of the soap and detergent industry prior to filing the civil complaint. The Grand jury had long since terminated its business when the lower court entered the discovery order. The trial court found that the testimony was relevant. The government does not claim that the testimony is

privileged or that it is absolutely shielded by secrecy. The government has used the transcript in preparing for this case and proposes to use it at the trial. The government has used a grand jury transcript at the trial in other civil cases, and it recognizes the possibility that Appellees may obtain access to this transcript in connection with the testimony of witnesses at the trial in this case. It concedes, indeed it contends, that Appellees could obtain the substance of the testimony by oral deposition under Rule 26 (F.R.C.P.). But this would require many months of effort, would further delay trial, and would not be an adequate substitute.

IV. The discovery order was entered as part of a program of administering the Big Case. The case had been pending almost 3½ years. It was nowhere near trial. The Government had not even concluded its discovery, despite the preceding 18 months of Grand Jury investigation and the accumulation of hundreds of thousands of documents. The discovery order was a sensible means of giving Appellees information already recorded. Its denial would require five sets of counsel to travel throughout the country, taking the depositions of 27 witnesses (one of the major Grand Jury witnesses having died). Appellees clearly established "good cause" for production of the transcript.

V. This Court should not circumscribe the power of the harrassed trial judges to cope with the enormous scope of the Big Case, nor should it permit appeals from interlocutory orders direct to this Court, to be taken with the effect of disrupting the progress of these cases and transferring administration from the trial courts to this Court.

ARGUMENT

I.

THE ISSUE

In reality, there is a single issue before this Court: the freedom that will be allowed to district judges to cope with one of the most vexatious problems of judicial administration, namely, the management of the Big Case (see note 1, *supra*). This case does not present an abstract or general problem concerning the availability of grand jury testimony. It presents a narrow, limited question of the use of grand jury testimony, obtained for the Government's discovery purposes, in a subsequent civil suit.

Technically, the questions before this Court are two: (i) whether the case may be lifted from the trial court to this Court for review of an interim discovery order by the simple device of voluntary dismissal, and (ii) whether the trial court may, if it deems it necessary in the administration of the Big Case, afford defendants an opportunity to inspect the transcript of grand jury testimony as part of their discovery.

Actually, both questions are aspects of the same issue: Will this Court interfere, in mid-stream, with the trial court's efforts to save time and expense, to reduce the fantastic burden, and to assure complete mutual disclosure in a Big Case?

We respectfully submit that there can be only one answer to this question. This Court should encourage and not discourage trial judges to feel free to use all means at their command to short-cut the Big Case. It should not encourage or permit the delay consequent upon an appeal to review an interlocutory order in the Big Case.

It is well known to the antitrust bar and judges that, in the final analysis, only a vigorous trial judge willing to improvise procedures to fit the needs of the specific situation, can shorten the Big Case so that it can be tried within the life expectancy of the participants.[6] Rules are only subsidiary aids. Each case is different; and the best road to its end can be found only by allowing the widest latitude to the trial judge.

Certainly, in the context of the present case it cannot be said that the trial judge abused his discretion by ordering that the testimony of the witnesses who had been called by the Government in its "discovery" proceedings before the Grand Jury should be made available to the defendants.

At the time of the Court's ruling in April 1956, the case had actually been in process since December 1952, nearly 3½ years. It was nowhere near trial. The Government's discovery had not been completed despite the "blizzard of papers" obtained before the Grand Jury and the huge masses of additional documents turned over by Appellees during the civil case.[7] Appellees' discovery was in its earliest stages: Appellees were examing the documents turned over to the grand jury by third parties, p. 5 *supra*. It was clear that Appellees would move, among other things,

---

[6] "Without a firm attitude on the part of the judge no measure for minimum volume, expense, and delay will be effective." Judicial Conference Report, Procedure in Antitrust and other Protracted Cases, 1951, 13 F.R.D. 62, 65.

[7] Appellees had produced thousands of documents in response to the Government's Motion for Discovery dated August 23, 1954, p. 3, *supra*. (See orders dated February 28, 1955; April 19, 1955; November 9, 1955, not printed).

to take the depositions of the 27 living witnesses who had testified before the Grand Jury because, as the trial court found, the Government had used and proposed to use this testimony at the trial (R. 213, 218).

It is important to obtain a realistic conception of what would have been involved in these 27 depositions: The witnesses were scattered all over the country (R. 169). About nineteen of them were not connected with any of the defendants at the time of the order respecting the transcripts (R. 471-472). Even if one defendant felt it was unnecessary to examine one of its officials who had testified, the other defendants would insist upon taking his deposition. To take the deposition of any of the persons who had testified before the Grand Jury, a time convenient to him and to all of the five sets of counsel in the case would have to be found. Each witness would probably be examined by at least several of the five sets of lawyers. In all probability, objections or issues would arise in the course of taking the depositions which would require recourse to the court (the filing of motions, etc.).

Is it any wonder, then, that the trial judge decided that it was entirely sensible and just to allow the defendants to inspect testimony of the witnesses before the Grand Jury instead of going through this needlessly elaborate process?

II.

THE GOVERNMENT'S CONTENTIONS

In this context, the Government's contentions seem, we submit, entirely trivial.

1. *Substantive:* On the substantive issue, the Government does not contend that the testimony of witnesses before a Grand Jury cannot be ordered produced for inspection and copying under Rule 34 in a subsequent civil case. It claims merely that Appellees have not shown "good cause" for such production in this case. It asserts that "disclosure of grand jury testimony may be ordered in a civil case only if a party makes an unusually strong, and a particularized showing that he cannot effectively try his case without breaching such secrecy" (Gov't. Br. 16).

It is not necessary to quarrel with the general thrust of this statement in order to sustain Appellees' position. Indeed, it seems absurd to argue that there was not "good cause" for the order entered by Judge Modarelli in the present case. The salient points are as follows:

> (i) The order was entered to facilitate the administration of a Big Case. About three and one-half years had elapsed since the filing of the complaint—and about five years since the commencement of the Grand Jury proceedings. The Government had not concluded its discovery. The weary court faced the prospect of additional years of discovery. It entered the present order as part of an elaborate procedure devised to administer the case and bring it to trial within a foreseeable time.

(ii) As discussed above, it is conservative to estimate that if Appellees were to take the depositions of the twenty-seven Grand Jury witness, at least a year would be required *for this process alone*, and it would not yield reliable information.

(iii) The Government concedes — indeed, it urges — that Appellees could take the deposition of the witnesses and could require them to disclose their statements before the Grand Jury (Gov't. Br. 46-47; see Rule 6 (e), Federal Rules of Criminal Procedure which prohibits the imposition of any obligation of secrecy upon any witness). *This consideration makes it entirely clear that there is no issue here as to the secrecy of the witnesses' testimony.* The only issue is whether there will be disclosure of the testimony *as recorded* before the Grand Jury, or *as recalled* by the witnesses upon subsequent examination.

(iv) Since the Government concedes that the testimony of witnesses before a Grand Jury may be made available for inspection upon a showing of "good cause", its position necessarily is that this Court should intervene and supersede the trial court's judgment as to the necessities of this Big Case. We cannot believe that this Court will announce its willingness to undertake a policing function of this nature, the effect of which will be to stultify the administration of Big Cases.

2. *Procedural.* On the appealability of the order in the present case, the Government does not dispute the point that it procured the dismissal in order to present to this Court for review the interlocutory discovery order involved herein. By this simple device of a

procured dismissal, which does not subject the Government to substantial hazards in an antitrust case, as we shall discuss, the Government seeks the right to transfer, in *medias res*, the administrative control of a Big Case from the trial court to this Court, by direct appeal.

As we shall show, their technical arguments to support their position are not sound; but apart from this, the result they seek would create chaos in the trial of big cases and add greatly to the already excessive burdens of this Court.[8]

III.

THE DISTRICT COURT'S ORDER OF DISMISSAL IS NOT APPEALABLE

A. The District Court's Order Is Not Appealable Because It Is Not a Final Determination of the Controversy

This appeal is an attempt by Appellant to obtain immediate appellate review of an interlocutory order of the District Court requiring the production of certain documents prior to trial. Such an order may not, of course, be appealed. Appellate review may be had only after adjudication of the merits of the controversy, or, prior to final determination of the controversy, only by disobeying the order to produce and incurring the penalty of contempt. *Alexander* v. *United States*, 201 U.S. 117;[9] *Cogen* v. *United States*, 278 U.S. 221; *Apex Hosiery Co.* v. *Leader*, 102 F. 2d,

[8] Since this Court is vested with exclusive jurisdiction to review civil antitrust cases to which the United States is a party (15 U.S.C. § 29), the burden of processing such appeals would fall directly upon this court.

[9] This Court stated in *Alexander* v. *United States*, *supra*, (201 U.S. at 121): "[S]uch an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the

702 (3rd Cir., 1939); *R. D. Goldberg Theatre Corp.* v. *Tri-States Theatre Corp.*, 119 F. Supp. 521 (D. Neb., 1944); Moore, Commentary on the U. S. Judicial Code 502 (1949).

In the present case, Appellant, instead of following the accepted procedures for review, has sought to convert a non-appealable order into a reviewable issue by the simple device of obtaining dismissal of the case. But this does not transmute an interlocutory order into a "final judgment". The order sought to be reviewed did not prevent or hinder Plaintiff from prosecuting its case. It did not dispose of the merits of the controversy. It was an interlocutory, intermediate, procedural order designed to expedite disclosure to Appellees of information which the Government was using and proposed to use at trial. It had none of the elements of a "final judgment".

Appellant's right to appeal in this case rests upon 15 U.S.C. § 29; 32 Stat. 823. The statute limits review to "final judgment[s]". Whether an order is final depends upon whether or not it represents a conclusion of the entire controversy. *Cobbledick* v. *United States*, 309 U.S. 323, 325-26. Piecemeal review of isolated issues has been forbidden by Congress (*Ibid.*).

Finality, as this Court has defined it, is a practical concept, not a matter of mere form. In other words, "A 'final decision' generally is one which ends the

---

effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further, and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case."

litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233. Whether a motion and order "is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances". *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 802.

A dismissal which leaves the merits of a controversy undetermined and arises only from a collateral or subsidiary issue is not a final order.

It is not every dismissal order that is a "final judgment" giving rise to a right of appeal. An interlocutory order is not ripened for review by the simple process of a procured dismissal. Where the plaintiff obtains dismissal or consents to it, it is necessary to inquire into the nature and effect of the underlying order. This is illustrated by *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936). Plaintiff moved to remand an action which had been removed from a state to a federal court. When the motion to remand was overruled, Plaintiff moved for a judgment dismissing the case which was granted. The Court of Appeals for the Fourth Circuit held that the dismissal was not final because the underlying order refusing to remand was not final or appealable. In language which is especially apt here, the Court said (86 F. 2d at 297): "The crux of the matter is that an order to remand is not a final order, the plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing." Compare *Parr* v. *United States*, 351 U.S. 513, and *V. O. Machinoimport* v. *Clark Equipment Co.*, 12 F.R.D. 191 (D.S.D.N.Y., 1951).

In contrast to the above cases are situations where the plaintiff is, in practical effect, prevented from proceeding with the controversy so that the order actually terminates the litigation between the parties on the merits of the case. Such an order is final. *St. Louis, I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28. This was the case in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793. In that case certain orders of the District Court prevented the United States from using for purposes of trial, certain documents on which it relied. This made it impossible for plaintiff, the United States, to prove its case. The case was thereupon dismissed for failure of proof but without prejudice to bringing it another time. The dismissal was not at the invitation of the plaintiff. 336 U.S. at 794. Since the United States was, in actuality, precluded by the pre-trial orders from bringing its case again, it was able to obtain review of the dismissal.

The order of dismissal entered below is clearly not a final determination of this controversy on the merits, nor does it bring to this Court for review any order of the court below which either legally or practically determines the decision of the merits of the controversy. The Government raises only one issue here: the propriety of a direction, prior to trial, requiring the appellant to make available certain recorded testimony to the appellees.

Obviously, if this testimony had been made available, the Government would not have been prevented from proceeding with its case. Indeed, it would not even have been hampered in doing so, since it concedes that the substance of the testimony could have been

obtained by Appellees on oral depositions of the witnesses.

Accordingly, the present appeal does not meet the pragmatic standard of a "final judgment" laid down by this Court in *Cobbledick* and other cases, *supra*. The order presented for review did not, in fact or form, have the practical effect of terminating the litigation. It did not, as in *Wallace & Tiernan*, deprive a party of the use of indispensable evidence. It did not relate to the merits. Instead, it merely required disclosure to the defendants of information already available to the plaintiff.

There is no case in which such an order has been held appealable. In truth and in fact, the Government in the present case dismissed its case *not* because of compulsion resulting from a ruling of the court below, *not* because the merits had been determined as a practical matter, but because it wanted this Court to review "a question which has happened to cross the path of [the] litigation". *Segurola* v. *United States*, 275 U.S. 106, 112.

We respectfully submit that the decisions of this Court clearly establish that appeal does not lie in these circumstances. The entirely procedural and interlocutory character of the order is made dramatically clear by the circumstances under which the Government procured dismissal of the case. It obtained the dismissal order "to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes" (R. 332).

The Government did not, and could not, claim that compliance with the production order would make it

impossible for the Government to prosecute the case. As the Attorney General said (R. 319), the Department of Justice considered the order "erroneous"; they decided not to comply with it but to seek review; and they proceeded to engineer a dismissal so that they could do this. They could have sought review on a contempt order, but they considered this to be "unseemly". Since they considered the "implications of the decision below" to be "profound and far reaching" (Jurisdictional Statement, p. 10) they could have asked this Court whether it concurred in the importance of the question and if so, whether it would grant an extraordinary writ under 28 U.S.C. § 1651. Instead, they took matters into their own hands, procured the dismissal of the case, and filed a direct appeal, invoking, so they hoped, the mandatory jurisdiction of this Court.

This effort at a forced play, we submit, must fail. Not only is the order presented for review interlocutory and non-appealable, but also the very fact that the Government, without legal or practical cause, except to obtain review at its own time and on its own terms, requested and procured the dismissal, necessitates disallowance of this appeal. The Government having chosen to dismiss the complaint in the absence of circumstances which precluded it from proceeding with the case, cannot appeal.

B. The Dismissal Order Is Not Appealable Because It Was Voluntarily Invited and Procured by the Appellant

There can be no doubt that the dismissal order herein was occasioned solely by the Government. The Government sought it; it was not sought by the Appellees; it was not imposed by the Court. More-

over, the Government's action was voluntary in fact as well as in form. There was no compulsion upon the Government to move for dismissal. There was no order or adjudication of the court, as in *Wallace & Tiernan*, *supra*, which made it impossible for the Government to go forward with its case. There was no circumstance, as in *Thomsen* v. *Cayser*, 243 U.S. 66, which demonstrated that further prosecution of the complaint would be pointless. The Government freely chose to dismiss, and having made this choice, it cannot appeal.

As the record shows, the original orders entered by the Court on July 23, 1956, provided no penalty for disobedience, p. 8, *supra*. They merely required production of the testimony within thirty days. In the event of disobedience, the Court had a variety of remedies and sanctions available to it under Rule 37 (F.R.C.P.). It could have done any one of the following things:

(i) It could have regarded the refusal as contempt of court.

(ii) It could have entered an order prohibiting the government from using the transcript at the trial or in connection with any depositions.

(iii) It could have prevented the government from introducing evidence to support certain claims or in opposition to various defenses.

(iv) It could have stricken parts of the complaint.

(v) It could have stayed the proceeding pending compliance with its order.

Dismissal was by no means inevitable, or even probable. The defendants—Appellees at no time

moved for dismissal or agreed to it.[10] It was voluntarily selected by the Appellant who, as we have described, proposed the dismissal, *not* because the order prevented successful continuation of the case, but because it desired to engineer this method of obtaining an appeal.

In these circumstances, we submit that there can be no doubt the Government may not appeal.

This Court has said on numerous occasions that a plaintiff who has voluntarily dismissed his complaint cannot sue out of a writ of error. *Evans* v. *Phillips*, 4 Wheat. 73; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 39. Lower courts have reiterated the rule. *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir., 1906, Sanborn, J.); *Marks* v. *Leo Feist, Inc.*, 8 F. 2d 460 (2d Cir., 1925). As the court put it in *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284, 285 (5th Cir., 1918), "A plaintiff cannot except to his own motion for a voluntary nonsuit because, if it was error to grant it, he invited the error". See also *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir., 1936).

The cases relied upon by the Government do not challenge this principle and do not lend any support whatever to the contention that the present order may be appealed.

In *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, the order presented for review barred the Government from using at trial, evidence adduced before an

[10] Counsel for appellees merely indicated that in the circumstances the amended order providing for dismissal "does not seem to be a relief which [they] could in any manner oppose" (R. 334-335).

illegally constituted grand jury. Without that evidence the Government could not prosecute its case. Additionally, the order of dismissal was not sought by the Government, but was entered by the Court on its own motion. Neither in fact nor in form was the dismissal voluntarily procured by the Government.[11]

In *United States* v. *Cotton Valley Operators Committee*, 339 U.S. 940, in which this Court was equally divided, the trial court had dismissed the complaint as a penalty imposed on plaintiff for its failure to comply with a discovery order. The action was dismissed at the initiative of the Court;[12] the Government did not propose dismissal. There is no basis whatever for a claim that the *Cotton Valley* case involved a voluntarily procured dismissal order.[13]

The Government's heavy reliance upon *Thomsen* v. *Cayser*, 243 U.S. 66, is misplaced (Gov't. Br. 23-27). That case (described in the margin[14]) did not involve

---

[11] ". . . The record fails to sustain appellees' contention that the Government invited the court to enter this order denying relief and dismissing the action." (336 U.S. at 794).

[12] ". . . [T]he court announced that the only course left was to dismiss the complaint for failure to comply with its orders." 9 F.R.D. 719 at 721.

[13] *United States* v. *Zucca*, 351 U.S. 91, upon which Appellant relies (Gov't Br. 21-22) was likewise dismissed upon the Court's own initiative and not at the instance of the government. In a denaturalization proceeding, the Court "ordered the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days. As this was not done, the complaint was dismissed without prejudice to the Government's right to institute an action to denaturalize the respondent upon filing the affidavit." (351 U.S. at 92.)

[14] *Thomsen* v. *Cayser* was a private action for treble damages under the Sherman Act. Plaintiff charged that defendants, who were common carriers, had entered into a conspiracy to grant rebates to shippers who had exclusively patronized defendants'

an appeal from an interlocutory order; there had been a trial and judgment on the merits for plaintiff which

lines. The trial court dismissed the complaint on the ground that the acts complained of did not constitute an unreasonable restraint of trade and no injury had been shown. *Thomsen* v. *Union Castle Mail SS Co.*, 149 Fed. 933 (D.S.D.N.Y. 1907). On appeal, the judgment was reversed, *Thomsen* v. *Union Castle Mail SS Co.*, 166 Fed. 251 (2d Cir., 1908). The Court of Appeals held that "whether the restraint of trade imposed by the combination was reasonable or unreasonable is, under repeated decisions of the Supreme Court, immaterial." The second trial resulted in a jury verdict and judgment for plaintiff. Before the case reached the Court of Appeals a second time, this court announced in *Standard Oil Co.* v. *United States*, 221 U.S. 1, and *United States* v. *American Tobacco Co.*, 221 U.S. 106, that the "rule of reason" was applicable to Sherman Act violations. In light of these cases the construction of the Sherman Act by the Court of Appeals on the first appeal was erroneous, and, as that court observed, the case had been retried on the erroneous premise that the rule of reason was not applicable to restraints of trade. *Union Castle Mail SS Co.* v. *Thomsen*, 190 Fed. 536 (2d Cir., 1911). In the view of the Court of Appeals, the record of the second trial did not establish an unreasonable restraint of trade (*ibid*). The court felt, however, that it would be "unduly prejudicial to the plaintiffs to reverse the judgment with directions to dismiss the complaint" because "upon another trial the plaintiffs may be able to produce additional testimony tending to make out a case," i.e., showing that the restraints were unreasonable. The court accordingly reversed the judgment and remanded the case for a new trial (190 Fed. at 537).

Plaintiffs thereupon advised the Court of Appeals in a petition that they "did not desire to present additional testimony and d[id] not wish a new trial of this action." (190 Fed. 1022). Plaintiffs stated that they were "willing to stand on the record as made" and that in lieu of an order remanding the case for a new trial, they preferred instead a "decision reversing the judgment and directing the court [i.e., the trial court] to dismiss the complaint in order that they may carry the case to the Supreme Court without further delay." (*Ibid.*) The Court of Appeals granted this request; it recalled the mandate and reversed the judgment with directions to dismiss the complaint.

It was on the record in this posture that this Court rejected a claim that the plaintiffs were barred from an appeal because they had consented to a judgment against them (243 U.S. at 83)

the Court of Appeals reversed because "as a matter of law * * * the acts of the defendants as disclosed upon the present record" did not constitute a violation of the Sherman Act. *Union Castle Mail SS Co.* v. *Thomsen*, 190 Fed. 536 (2d Cir., 1911). After the Court of Appeals had entered an order remanding the case for a new trial, plaintiffs informed the court that they "did not desire to present additional testimony" and that they were "willing to stand on the record as made" (190 Fed. at 1022). Further proceedings would therefore have been pointless; a new trial would have led to exactly the same result. There had been in effect a final determination on the merits. The situation was analogous to an order dismissing a complaint for failure to state a cause of action with leave to plead over; a plaintiff who elected to stand on his complaint would not be said to have solicited or consented to dismissal. The plaintiff's action in *Thomsen* was not in fact voluntary; it was forced upon him because he had no "additional testimony" to present.[15]

In the cases upon which the government relies, there is no doubt that the order of dismissal, as a practical

[15] In *Federal Baseball Club* v. *National League*, 259 U.S. 200, upon which Appellant relies (Gov't. Br. 25, note 9) the Plaintiff advised the Court of Appeals, after reversal of a jury verdict for Plaintiff, that it "does not desire to present additional testimony, nor does it wish a new trial, but it is willing to stand on the record as made" (269 Fed. 681 at 688). Petitioner in *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210 "waived a new trial and consented to entry of final judgment" after the Court of Appeals had concluded that on the record "plaintiff cannot recover" (261 Fed. 65 at 67). In these cases there was only a question of law which had been resolved by the Court of Appeals after a trial on the merits adversely to Petitioner, so that the suits were terminated so far as the lower courts were concerned.

matter, precluded the plaintiff from proceeding further with its case. In *Wallace & Tiernan, supra*, the Government was denied access to evidence essential to its case; in *Thomsen* v. *Cayser, supra*, the case was over unless this court sustained Plaintiff's contention that the evidence of record established a violation of the Sherman Act.

Consideration of these cases in contrast with the present appeal illuminates the correct, rational line of decision which should be followed here. As this Court has repeatedly emphasized, determination of appealability and decision as to what constitutes a "final judgment" is a practical, pragmatic inquiry. In the present case, there was no necessity for the Government to seek a dismissal order. It chose to do so, despite the availability of other interim remedies and despite the fact that nothing in the underlying discovery order prevented it from proceeding with the case. Having made this choice, it has no standing to appeal. Certainly, it will not be permitted by this engineered dismissal to claim the attention of this Court, on direct appeal as of right, with respect to a procedural, interlocutory order.

C. The Effect of the Dismissal

The Government's brief suggests that it "believe[s]" that the order dismissing the complaint was with prejudice (Gov't. Br. 29, Note 11). Even if this is so, the appeal from that order may not be entertained: It was solicited by the Government; dismissal was not the inevitable or even the probable consequence of the Government's non-compliance because of the availability to the court of other remedies and sanctions; the effect of the order did not, as a

practical matter, prevent the Government from going forward with the case (contrast *Wallace & Tiernan, supra*); the litigation was not terminated as a practical matter in the sense that further proceedings would have been idle, as in *Thompson* v. *Cayser, supra*; and in any event, if interim review was desired, the Government had other procedures available to it including a petition for a preogative writ or appeal from a judgment of contempt.

However, we feel required to state that it is not clear that the dismissal was with prejudice. The order itself is silent on the subject, it being in the form proposed by the Government. The applicable rules indicate that the dismissal may operate as a dismissal without prejudice.

Rule 41(a)(2) provides that a dismissal "at the plaintiff's instance" is "without prejudice" unless the order otherwise specifies; the order of dismissal in this case was made upon "the plaintiff's instance" and does not specify that it is with prejudice (R. 327).

Appellant derives a contrary conclusion by incorrectly quoting Rule 41(b) as follows (Gov't Br. 29, note 11): "Rule 41(b) provides for 'Involuntary dismissal' [i.e., with prejudice] for 'failure of the plaintiff * * * to comply with * * * any order of court.'" The provision purportedly quoted, however, applies only to involuntary dismissals *on motion of the defendant*.[17] No such motion was made by defendants in the present case.

---

[17] The first sentence of Rule 41(b) (with the language deleted by Appellant underscored) reads as follows:

> "For failure of the plaintiff *to prosecute or* to comply with *these rules or* any order of court, *a defendant may move for dismissal of an action or of any claim against him.*"

Appellant next refers to the last sentence of Rule 41(b) which provides that a dismissal *not provided for in the rule* is also with prejudice unless otherwise specified. That provision is similarly inapplicable because Rule 41(a)(2) *expressly* provides for dismissal by order of the Court "at plaintiff's instance"—precisely what occurred here.

Appellant seeks to assimilate this case to very different procedural situations. Thus, Appellant argues (Br. 21) that "If the production orders *as originally entered* had provided for dismissal in case of non-compliance, unquestionably the Government could have appealed a judgment of dismissal entered as a result of non-compliance, and could have tested the production order on such appeal." (Emphasis supplied) (See also Gov't. Br. 28.) The short answer is that the discovery orders as *originally entered* (the orders of July 23, 1956, R. 262 *et seq.*) did *not* provide for dismissal, p. 8 *supra*. In addition, Appellant maintains (Gov't Br. 22) that if "the court, upon non-compliance, had dismissed *on its own motion*, the production ruling could have been tested on appeal from such motion". (Emphasis supplied.) A dismissal by the Court on its own initiative under Rule 37 (b)(2)(iii) because of non-compliance with a discovery order is expressly declared by Rule 41 (b) to be "an adjudication upon the merits", unless the Court otherwise specifies in its order for dismissal.[18] But the dismissal here

[18] The dismissal order in *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (D. La. 1949), aff'd by an equally divided court, 339 U.S. 940, was apparently entered by the Court on its own motion as a penalty for non-compliance.

was *not* made by the Court "on its own motion". It was made at the instance of Plaintiff.[19]

In any event, the consequences of a dismissal with prejudice in an antitrust case like the present may easily be exaggerated. The complaint has been pending since December, 1952. Any relief that the Government may obtain in this case will be based upon the situation at the time of the decree. That will be some time in the future; and if the Government prevails in forcing Appellees to take the depositions of twenty-seven grand jury witnesses, it will be a long, long time in the future. Actually, the complaint is completely outmoded, even if it is assumed that it once had applicability to the facts. In the intervening years, the industry has been revolutionized by a change from basic use of fats and grease to chemicals and synthetics (R. 46).

If there is any basis for relief in the present case, a new complaint and a new set of allegations will be necessary in any event. While precise prediction is impossible, it would certainly be rash to assume in ad-

---

[19] *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, upon which Appellant relies (Gov't Br. 13, 29) does not support its position. A state court in that case struck the pleadings of defendant and entered a default judgment in favor of plaintiff after defendant had refused to comply with an order to produce books and papers and certain persons for examination before trial. The motion to strike and for default judgment was made by plaintiff pursuant to a statute which provided that it shall be "the duty of the court, upon motion of the attorney general * * * to strike out the answer * * * and to render judgment by default" against any non-complying corporation. (212 U.S. at 339). In short, *Hammond Packing Co.* involved (i) an appeal from a dismissal with prejudice (ii) which was not made at the instance or with the consent of the party against whom the discovery order was entered.

vance that if—which is not the case—any antitrust violations exist, they would be barred by application of *res judicata*.

On the other hand, the procedure for which the Government contends is certainly a dangerous instrumentality. It will mean that in any case where a party is aggrieved by a discovery order, he may dismiss the case and appeal the order despite its interlocutory character. In the case of antitrust actions brought by the Government, this would mean a direct appeal to this Court (15 U.S.C. 29). The effect upon this Court and upon already excessively delayed litigation in the trial courts is readily apparent. This kind of piecemeal review certainly should not be permitted.

IV.

THE MERITS.

The only issue urged by the Government on the merits is that the Appellees failed to show "good cause" for the inspection of the testimony of the witnesses before the Grand Jury. The Government does not contend that a rule of secrecy should shield such testimony from inspection of a subsequent civil suit. Indeed, it stresses the fact that the defendants may discover what the witnesses said to the grand jury. (Gov't. Br. 46-47) Its position is merely that defendants should be required to do this by the long, elaborate, time-consuming, expensive process of oral deposition; and that it was an abuse of discretion for the trial court to say, in effect, that since the defendants can find out what each witness testified to, it is obviously sensible and appropriate to make available their testimony in already recorded form.

The issue presented is, therefore, extremely limited. We are not concerned with the considerations that might be present where access to testimony before a grand jury is sought while the grand jury is still in session. Here the grand jury had completed its sessions and had been discharged more than three and one-half years before the order was entered. We are not concerned with an effort to probe the deliberations of the grand jurors themselves. We are not here concerned with the considerations that might be present in a criminal case where the discovery allowed to defendants is more severely limited than in civil cases[20] and different policy considerations apply.

We are here concerned with a question which can arise almost exclusively in a handful of major, civil antitrust cases where the grand jury has served as an instrument for civil discovery, where no indictment has been returned, and where as the Government admitted, it is using and proposes to use the testimony of witnesses taken before the grand jury for purposes of the civil proceeding (R. 274; Finding of the Trial Court, R. 212-213).[21]

There is no doubt as to the letter and spirit of the law with respect to mutual discovery in a civil anti-

---

[20] For example, in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, this Court restricted the reach of Criminal Rule 17 to "evidentiary materials." See Comment, *Pre-Trial Disclosure In Criminal Cases*, 60 Yale L. J. 626 (1951).

[21] The Government did not concede that its purpose in convening the grand jury was restricted to discovery for a civil case. But that was the result. It is recognized and admitted that the Antitrust Division commonly uses grand juries for civil discovery (See R. 210-211, Note 7).

trust proceeding. It is to encourage, to compel, full, complete and unrestricted disclosure of relevant information. *Hickman* v. *Taylor*, 329 U.S. 495.

There is no doubt that the Appellees could discover the testimony of the grand jury witnesses by taking their depositions, although, as we have discussed this would have been an unsatisfactory substitute. There is no doubt that the Government could not, apart from the grand jury device, have taken the testimony of witnesses *in camera*, concealed from the Appellees. Indeed, a special Act of Congress applicable to the Sherman Act requires that "the taking of depositions" in such cases "shall be open to the public" "and no order excluding the public from attendance on any such proceedings shall be valid or enforceable" (15 U.S.C. §30; 37 Stat. 731).

In the present case, therefore, there is no question as to the right of Appellees to the discovery of the witnesses' testimony. The only question is as to method: Whether the trial judge, in the circumstances of this Big Case abused his discretion in making available to Appellees this testimony in the convenient, reliable form in which it was recorded before the Grand Jury, or whether he was forced to remit them to many months of labor and to subject them, the Government and the court itself, to the mammoth burden, expense and delay of pursuing the unsatisfactory substitute of taking the depositions of the witnesses.

As we have pointed out, the Government does not contend that there is a doctrine of secrecy of testimony before grand juries which bars such disclosure.

It contends only that extraordinary cause for such disclosure must be shown, and that it did not exist in the present case.

But if the requisite cause for disclosure did not exist in this case, it is difficult to imagine a case where it could be shown. There is no question as to relevance or materiality of the testimony; there is no question as to the Appellees' right to knowledge thereof; there can be no doubt that the taking of the depositions of the witnesses four or five years after their grand jury testimony, would be at best an inadequate substitute for access to the recorded testimony;[22] and there can be no question that the order for disclosure was sensible and appropriate—indeed, imperative—in the administration of this Big Case.

As we have pointed out, at the time of entry of the order, the case had been pending for almost 3½ years. The Government's discovery was not completed, and the defendants' had not commenced. Indeed, the character of the industry had completely changed from one principally devoted to processing natural fats, to one primarily devoted to synthetics (R. 46). The leading lawyer for the Department of Justice in this case had retired and been replaced. Counsel for the Appellees and the trial judge himself were growing no younger. Witnesses were aging, retiring and even passing to the life beyond. Documents, pleadings, court orders were multiplying in staggering proportions. The cost of the proceedings was becoming a major item. The conscientious trial judge (since deceased) had desperately devised elaborate and promising procedures to govern many of the problems.

[22] Indeed, at least one of the important witnesses, James A. Reilly, Executive Vice-President of Colgate, was deceased (R. 472).

Can it be seriously argued that he did not have "good cause" for remitting the parties to a reading of recorded testimony in lieu of taking it all over again?

There is no rule of law, no precedent, which supports the Government's opposition. In general, the requisite showing of "good cause" under Rule 34 is met merely by an indication of the relevance and materiality of the material requested.[23] "Above all", as Government counsel said, "the liberal objectives of the Rule should be the touchstone." (R. 128). A customary type of "good cause" affidavit, used by Government counsel in this case, is set forth in the margin[24] (R. 52).

Prior statements of witnesses have repeatedly been required to be produced in response to Rule 34 motions. In these instances, it has been held that if the statements are relevant, adequate reason exists for compelling their production to avoid waste of time and energy and because ascertaining the prior testimony by subsequent deposition would not be satisfactory because of the dimming of memory through lapse of time.[25]

---

[23] 4 Moore's Federal Practice § 34.08, p. 2450 (2d ed. 1950).

[24] "Walker Smith, being first duly sworn, says:

The documents called for in the attached motion, as listed in the attached Exhibit 'A', are relevant or material to the issues of this cause and are needed to aid the plaintiff in the preparation of its case, and particularly in support of the allegations contained in paragraph 34 of the Complaint.

Walker Smith, Trial Attorney, United States Department of Justice."

[25] *Herbst* v. *Chicago Rock Island and Pacific R. Co.*, 10 F.R.D. 14, 18 (D. Ia., 1950); *Bingle Liggett Drug Co.*, 11 F.R.D. 593 (D. Mass., 1951); *Panella* v. *Baltimore & Ohio R. Co.*, 14 F.R.D.

Hickman v. *Taylor*, *supra*, upon which the Government relies does not support their position. In the first place, *Hickman* involved the lawyer's "work product". Certainly, grand jury testimony is not in this category.[26] Indeed, since the Grand Jury is an arm of the Court, it may be that the court has more and not less freedom with respect to governing the use of transcripts taken in grand jury proceedings. In the second place, *Hickman* did not involve the recorded, sworn testimony of witnesses. As this Court said, it involved "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . . ." (329 U.S. at 509). As Mr. Justice Jackson pointed out in his concurring opinion, there is a vast difference between a lawyer's work product and the "signed statements or those written by witnesses". Mr. Justice Jackson observed that the latter

---

196, (D. Ohio, 1951); *Durkin* v. *Pet Milk Co.*, 14 F.R.D. 385 (D. Ark., 1953). In *Durkin*, the court stated (14 F.R.D. at 395): "If defendant is denied access to this data in the possession of plaintiff, it would have no other adequate means or remedy for obtaining this necessary information. Its alternative is to proceed to take separately the depositions of every one of the persons engaged in said hauling activities during the period referred to, to the extent that said persons were still subject to process. This would be a very lengthy and expensive proceeding. Even then, defendant could not be assured that it had the same data which is presently available in the files of the plaintiff, as there could be material discrepancies in the recollection of the various persons examined in view of the time which has elapsed since the original statements were obtained."

[26] The Government below argued that executive privilege attached to grand jury transcripts, presumably on the theory that they were Department of Justice property. This claim has been abandoned in this Court, but the Government's *Hickman* argument is reminiscent of the abandoned claim of privilege (R. 248, Gov't. Br. 31, Note 13).

may properly be the subject of a Rule 34 motion (329 U.S. at 519).

There is nothing in history, law or policy which would dictate such immunity as the Government seeks for the testimony of witnesses taken before Grand Juries. Reference is respectfully made to Lever's Memorandum filed in the trial court for a summary of the meagre historical materials that are relevant (R. 448-466). In recent times, the situation has been as follows:

1. In criminal cases, the courts will not permit access to grand jury transcripts for the purpose of attacking the validity of the indictment by determining whether probable cause existed. Most of the cases that have denied access to grand jury transcripts involve this issue.[27]

2. The statements and acts of the grand jurors themselves, as distinguished from witnesses before the grand jury, have long been protected by a strict, but not absolute, rule of secrecy. After the grand jury has risen, however, even this secrecy may be lifted and disclosure compelled if the ends of justice require. *United States* v. *Farrington*, 5 Fed. 343, 347 (N.D. N.Y., 1881); *Attorney General* v. *Pelletier*, 240 Mass. 264, 134 N.E. 406 (1922).

3. Even in criminal cases, the court may require disclosure of testimony given by witnesses before the grand jury, at least where the proceedings are con-

---

[27] See collection of cases cited in *United States* v. *General Motors*, 15 F.R.D. 486, 487, Note 2A (D. Del., 1954). It was in this type of case that Judge Learned Hand made his oft-quoted statement. *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D. N.Y., 1923).

cluded and the testimony sought is within the relatively restricted scope of the Criminal discovery rules: i.e., where they are evidentiary. Rules 6(e), 16, 17(c)); *Herzog* v. *United States*, 75 S. Ct. 349 (Douglas, J. Circuit Justice); *United States* v. *Remington*, 191 F. 2d 246 (2nd Cir. 1951) cert. den. 343 U.S. 907; cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150. In the *Remington* case, the Department of Justice had refused to disclose grand jury testimony even where the defendant was indicted for perjury committed before the grand jury. The Court, with Learned Hand, J., participating, held the defendant was entitled to his testimony. See also *Atwell* v. *United States*, 162 Fed. 97 (4th Cir. 1908); *Metzler* v. *United States*, 64 F. 2d 203 (9th Cir. 1933).

4. The testimony of witnesses before grand juries is not secret. They are not sworn to secrecy.[28] *United States* v. *Amazon Corp.*, 55 F. 2d 254, 262 (D. Md., 1931). Rule 6(e) of the Federal Rules of Criminal Procedure forbids swearing witnesses to secrecy. See also Advisory Committee's Note on Rule 6(e).

5. It appears to be generally recognized that after the grand jury's functions are ended, even the reasons for limited secrecy no longer obtain. Wigmore, Evidence, (3d Ed.) §§2360-2361; *United States* v. *Socony Vacuum Oil Co., supra.*

6. In civil cases, the question has seldom arisen. It can arise only in the rare case, like a Government antitrust case, where the civil suit is preceded by a grand jury investigation.

---

[28] See the different oaths administered to the jurors and to witnesses (R. 453), and cases cited (R. 454).

The Government, however, does not and could not dispute the proposition that such disclosure could be required in an appropriate case. We submit that the test of appropriateness is to be found by reference to the letter and purpose of the federal rules as to civil discovery. As contrasted with the criminal rules, the civil precepts encourage the widest possible discovery not merely of evidentiary facts, but of material which will lead to full mutuality, prevent surprise and contribute to the fullest, possible knowledge. In light of those rules, as we have discussed, there is no reason for hesitancy in sanctioning the disclosure of the testimony of witnesses before grand juries which has been and will be used by the plaintiff, particularly in the extreme circumstances of this Big Case.

The Government's only specific policy argument is that secrecy must be maintained in order to encourage witnesses to make disclosures to the Grand Jury (Govt. Br. 40-42). They do not, and could not, however, follow the logic of this argument. They do not and could not maintain that witnesses should be guaranteed that their testimony before the Grand Jury will never be revealed. On the contrary, the Government itself has disclosed their testimony as and when it suited their purpose. *United States* v. *Socony Vacuum Oil Co., supra.* In antitrust cases, the Government customarily uses grand jury testimony to "refresh" the recollection of witnesses. Sometimes it uses this testimony in wholesale quantities. See *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. at 233. Considerations of "secrecy" or the alleged desirability of secrecy to encourage untrammeled disclosures apparently have not occurred to the Government as a reason for restricting this practice.

Indeed, this practice of the Government discloses the worm in the apple tendered to this Court. What the Government really seeks is an advantage over private litigants in antitrust cases: namely, the opportunity to take *ex parte* testimony and conceal it from the defendants. This is neither fair nor in accord with the rules of practice.[29]

In addition, the Government recognizes the fact that the Appellee could obtain disclosure of the testimony of witnesses at the trial if and to the extent needed. Gov't. Br. 53; *cf. Jencks* v. *United States*, 353 U.S. 657. This, too, reduces the alleged secrecy objective to a phantom, wistfully pursued, without substance or reality, the only purpose of which would be to delay and encumber the trial of an already huge case.

---

[29] See *Bank Line* v. *United States*, 163 F. 2d 133, 138 (2nd Cir. 1947) where Judge Augustus Hand observed "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual."

A district judge has remarked that

"In all these cases, particularly in those seeking injunctive relief, the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating*. Thus, the Government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them*, through bills of particulars, to supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial. Judges, in our circuit, including myself, have been rather generous in compelling disclosure, so as to *channel* the inquiry." Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165, 168 (1950). (emphasis in original)

Indeed, the *reductio ad absurdum* of the Government's position is its own argument that Appellees should take the depositions of the witnesses rather than read their testimony in the grand jury transcript. This, the Government says, is an entirely adequate alternative (Gov't. Br. 46-47). If it is, then how can it be argued that the concealment of their *recorded* testimony will protect them or will preserve "secrecy"?

The Government has offered to make the names of the witnesses available. It has urged Appellees to take their depositions. It intends to use their testimony at trial. It concedes the possibility that Appellees may be able to obtain it as the trial progresses. Certainly in these circumstances, it cannot be urged that "secrecy" considerations prevent the disclosure of the testimony by order of the trial court in advance of trial where such disclosure will, without doubt, save hundreds of days, thousands of dollars, and promote and expedite the trial.

We respectfully submit that this Court should make it clear that it is within the powers of the trial judge to order disclosure of the testimony of witnesses before a grand jury in a subsequent civil suit (a) where the grand jury has terminated its business, (b) where the testimony is relevant to the civil suit, (c) where the Government has used or proposes to use such testimony in connection with the civil case, and (d) where the trial judge determines that making the transcript available will save time and expense and promote the effective administration of the case.

CONCLUSION

For the reasons stated, Appellee Lever Brothers Company respectfully submits that the appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

ABE FORTAS
WILLIAM L. MCGOVERN
ABE KRASH
1229 19th St. N. W.
Washington 6, D. C.

Attorneys for Appellee Lever Brothers Company

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 19th St. N. W.
Washington 6, D. C.

MARTIN J. PENDERGAST
390 Park Avenue
New York 22, N. Y.

April 14, 1958

APPENDIX

Federal Rules of Civil Procedure

RULE 34.

DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, eff. March 19, 1948.

RULE 37.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

* * *

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being di-

rected to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

Rule 41.

DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. As amended Dec. 27, 1946, eff. March 19, 1948.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in

the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. As amended Dec. 27, 1946, eff. March 19, 1948.

Federal Rules of Criminal Procedure

RULE 6. THE GRAND JURY

(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

APR 14 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 51.

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE COLGATE-PALMOLIVE COMPANY.

MATHIAS F. CORREA,
Cahill, Gordon, Reindel & Ohl,
63 Wall Street,
New York 5, New York,
Attorney for Appellee Colgate-Palmolive Company.

Of Counsel:
JERROLD G. VAN CISE,
JAMES B. HENRY, JR.,
New York, New York.

April 14, 1958.

INDEX.

	PAGE
QUESTIONS PRESENTED	1
STATEMENT	2
A. The orders for production	2
B. The judgments of dismissal	5
SUMMARY OF ARGUMENT	7
ARGUMENT	11
POINT I—The orders of the district court to produce transcripts of grand jury testimony cannot be reviewed on their merits through appeal of the invited judgments of dismissal	11
A. Appellant's invitation of dismissal in the district court	12
B. Inapplicability of *Thomsen* v. *Cayser*, 243 U. S. 66	14
C. Appeal of interlocutory orders	17
POINT II—The appellant has no standing to appeal the orders for disclosure of grand jury testimony	21
POINT III—The orders to produce the transcripts of grand jury testimony were a proper exercise of discretion by the district court	24
A. The liberal discovery policy in civil actions	26
B. The nature of the grand jury testimony and appellant's use of it	26
C. Inapplicability of any policy of secrecy	29
D. The justice of disclosure	34
CONCLUSION	42

Table of Citations.

Cases	PAGE
Alltmont v. *United States*, 177 F. 2d 971 (3d Cir. 1950), *cert. denied*, 339 U. S. 967	38
Atwell v. *United States*, 162 Fed. 97 (4th Cir. 1908)	30
In re Bullock, 103 F. Supp. 639 (D. D. C. 1952)	25, 30
Carlson v. *United States*, 209 F. 2d 209 (1st Cir. 1954)	21
Carroll v. *United States*, 354 U. S. 394	16
Cobbledick v. *United States*, 309 U. S. 323	16, 21
Connecticut Mutual Life Insurance Co. v. *Shields*, 17 F. R. D. 273 (S. D. N. Y. 1955)	39
Costello v. *United States*, 350 U. S. 359	31
Doe v. *Rosenberry*, 152 F. Supp. 403 (S. D. N. Y. 1957)	25, 30
Durbin v. *United States*, 221 F. 2d 520 (D. C. Cir. 1954)	21
Goodman v. *United States*, 108 F. 2d 516 (9th Cir. 1939)	30
In re Grand Jury Proceedings, 4 F. Supp. 283 (E. D. Pa. 1933)	25, 30
Hale v. *Henkel*, 201 U. S. 43	41
Herman Schwabe, Inc. v. *United Shoe Machinery Corp.*, 21 F. R. D. 233 (D. D. C. 1957)	23
Hickman v. *Taylor*, 329 U. S. 495	9, 10, 24, 26, 34, 36, 37
Hoffman v. *United States*, 341 U. S. 479	41
Jencks v. *United States*, 353 U. S. 657	34
Kelly v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936)	8, 18
Martin v. *Capital Transit Co.*, 170 F. 2d 811 (D. C. Cir. 1948)	38

PAGE

Parr v. *United States*, 351 U. S. 513 24
Ex parte Savin, 131 U. S. 267 21
Standard Oil Co. v. *United States*, 221 U. S. 1 15
Thomsen v. *Cayser*, 243 U. S. 66 ..... 8, 12, 14, 16, 17, 19
Union Castle Mail S.S. Co. v. *Thomsen*, 190 Fed. 536, 1022 (2nd Cir. 1911), *rev'd sub nom. Thomsen* v. *Cayser*, 243 U. S. 66 15
United States v. *Alper*, 156 F. 2d 222 (2d Cir. 1946) 30
United States v. *American Tobacco Co.*, 221 U. S. 106 15
United States v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D. N. J. 1955) 31
United States v. *Byoir*, 147 F. 2d 336 (5th Cir. 1945) 30
United States v. *Cotton Valley Operators Committee*, 339 U. S. 940 13
United States v. *Garsson*, 291 Fed. 646 (S. D. N. Y. 1923) 31
United States v. *Johnson*, 319 U. S. 503 31
United States v. *Rose*, 215 F. 2d 617 (3d Cir. 1954) 31
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 ..... 10, 30, 32
Wilson v. *United States*, 77 F. 2d 236 (8th Cir. 1935), *cert. denied*, 295 U. S. 759 21

Rules

Federal Rules of Criminal Procedure
Rule 6(e) 9, 21, 22, 23, 24, 26, 30, 39

Federal Rules of Civil Procedure
Rule 34 ..... 9, 24, 25, 26, 39

Treatise

8 Wigmore, *Evidence* §2362 (3d ed. 1940) 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 51.

UNITED STATES OF AMERICA,

Appellant,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE COLGATE-PALMOLIVE COMPANY.

Questions Presented.

The district court upon motion of the defendants in a complex civil antitrust action entered orders directing the plaintiff to produce for inspection and copying transcripts of the testimony of all witnesses who appeared before a grand jury during an investigation of the soap and synthetic detergent industry which immediately preceded the filing of the civil complaint. The transcripts of testimony were

admittedly in the possession of the plaintiff, had been used in preparation of the civil action and would continue to be so used. Upon motion of the plaintiff this order was superseded by an order providing that unless the plaintiff produced these transcripts for inspection and copying, the complaint would be dismissed. The plaintiff then failed to produce the transcripts, pursuant to its previously announced intention not to produce them; and the complaint was dismissed.

This appeal presents the following questions, rather than those stated in the brief for the appellant, who was the plaintiff below:

1. May the appellant procure review of the superseded orders for production of the transcripts through appeal of the judgments dismissing the complaint, where the dismissal was pursuant to an order entered on the appellant's own motion?

2. Has the appellant standing to appeal the orders for production of the transcripts on grounds of public policy in view of the status of the grand jury as an appendage of the district court?

3. Assuming the merits of the orders for production can be reached, did the district court abuse its discretion in ordering production of the transcripts under the particular circumstances of this case?

Statement.

A. The orders for production.

A federal grand jury sitting in Newark, New Jersey, for a full eighteen months from May 1951 to November 25, 1952 investigated possible violations of the antitrust laws in the soap and synthetic detergent industries. No indictment was returned (R. 207).

Through grand jury subpoenas large quantities of documents were secured from the present defendants, most of them during 1951, as well as from some 70 other companies and individuals (R. 226, 430-8, 471).

In addition, a number of witnesses were called. Of these the defendants were aware of the identity of 28, of whom 27 testified during the period from June 16, 1952 through November 18, 1952 (R. 471).* The last of these witnesses was Mr. E. H. Little, the president of Colgate-Palmolive Company (hereinafter called "Colgate"), who testified just one week before the grand jury was discharged (R. 483).

On December 11, 1952 less than three weeks after the grand jury was discharged, the complaint was filed in the present civil action. It was truly comprehensive in scope. Its allegations cover the period from 1926 to the date of filing, and they deal with every conceivable aspect of the soap and synthetic detergent industry, including purchasing of raw materials, sales methods, selling prices, by-products, patents, advertising, mergers and many other matters (R. 1-16).

A Department of Justice press release issued on the day the complaint was filed stated:

> "The filing of the complaint results from a careful and thorough investigation of the industry including extensive grand jury proceedings" (R. 211).

After the complaint was filed various complex pre-trial discovery methods were pursued. A discussion of the problems presented by this "big case" appears in an appendix

---

* The only summary in the record as to the number and nature of the witnesses appears as a statement in Colgate's brief in the district court. This statement has been adopted by the appellant, however, at pages 41-42 of its present brief; and presumably it is not subject to dispute.

to the district court's opinion granting production (R. 218-39). This pre-trial discovery resulted in some elaboration of the bare and conclusory allegations of the complaint, but up to the time of the motions for production of grand jury testimony, the plaintiff had not been ordered "to disclose any detailed, evidentiary facts" (R. 236) and had not done so.

It was against this background that the defendants' motions for production of the transcripts of grand jury testimony were argued on December 12, 1955 (R. 136). These motions sought only testimony, not any other proceedings in the grand jury (*e.g.*, R. 133). The civil action had been pending at that time for three years. Throughout that period it had been assigned to the same judge, the late Alfred E. Modarelli.

On April 17, 1956 the court filed a full opinion giving his reasons for concluding that the defendants were entitled to production of the grand jury transcripts (R. 206-18). The close of this opinion states:

> "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy. These motions were considered by me objectively and honestly by setting aside all my preconceived ideas on the subject.
>
> "The court concludes that since plaintiff is using the transcripts containing relevant information, the ends of justice require the court to order plaintiff to produce and permit the inspection and copying by defendants of the transcripts; equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial; none of the reasons for the rule of secrecy applies" (R. 217-8).

The plaintiff then filed a "motion for reconsideration" based upon a "Claim of Privilege" signed by the Attorney General pursuant to his formal determination that disclosure "would be prejudicial to the grand jury system and not in the public interest" (R. 247-9). On July 9, 1956 the court filed a second opinion denying this motion (R. 257-62).

Orders were then entered dated July 23, 1956 requiring production within thirty days (R. 262-7).

B. The judgments of dismissal.

The subsequent procedure resulting in judgments of dismissal is set out in some detail in Colgate's motion to dismiss or affirm dated January 2, 1957 at pages 4-8, and we shall only summarize it here.

At the hearing on July 23, 1956 when the orders for production were submitted and signed, counsel for the plaintiff informed the court that

> "the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered" (R. 330).

To this, counsel for the defendants replied that they would have to wait until expiration of the time for production and, if the plaintiff adhered to that position

> "we shall have to take such further steps under the rules as we may be advised" (R. 330).

No mention of dismissal was made by anyone.

On August 16, 1956 the plaintiff then filed a "motion to amend or, alternatively, to stay order of July 24, 1956" attaching a proposed order, an affidavit of Herbert Brownell, Jr. and a brief (R. 317-22).

The motion requested that an amended order in the form annexed be entered "in substitution for" the orders

for production previously entered. Clearly as a second choice a stay of these orders was asked pending the filing of appeals and/or application for an extraordinary writ (R. 317, 334).

Thus in presenting the proposed amended order, counsel for the plaintiff said:

> "And we are therefore coming before your Honor to suggest that the order be amended in a way to eliminate these possibilities. And, alternatively, *if your Honor does not see fit to amend the order* we are asking for a stay of the order pending the taking of necessary appellate review in the Supreme Court" (R. 333; italics added).

By this motion, the plaintiff sought to be relieved of the orders to produce. The basis for the motion was stated to be that it would be "unseemly" for the Attorney General to be placed in the dilemma of "having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order • • •" (R. 319). The brief in support of the motion recited:

> "If such an amended order is entered, the United States intends to appeal from the subsequent judgments of dismissal • • •" (R. 321).

A hearing on the motion was held on August 21, 1956. Counsel for the plaintiff restated these points (R. 332-4), and counsel for each of the defendants in effect took the position that while he considered the prior orders proper he did not see how he could oppose the relief sought by the plaintiff in the proposed amended order (R. 334-5). Accordingly, the order was signed by the court just as the plaintiff had submitted it (R. 335-6).

This amended order no longer required production of the grand jury testimony. It provided instead:

"Ordered that unless the plaintiff on or before August 24, 1956 produces * * * the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein" (R. 323).

The court inquired under date of September 6, 1956 by a letter to all counsel whether the transcripts had been produced, concluding:

"If the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (R. 361).

Counsel for the plaintiff replied that "plaintiff has not produced the grand jury transcripts for inspection by the defendants" (R. 362). Counsel for each defendant also replied, reporting that the plaintiff had refused to produce, and submitting judgments of dismissal (R. 363-7).

These judgments of dismissal were all entered on September 13, 1956 (R. 325-8).

Summary of Argument.

1. It is undisputed that judgments entered by invitation or on consent are always affirmed on appeal without consideration of the merits. Nor can an interlocutory order be appealed by taking a voluntary judgment of dismissal and appealing the order in the guise of appealing the judgment.

A. The appellant seeks to avoid these principles by saying that the dismissal here was not in fact invited or consented to, because it resulted not from the amended order which the appellant proposed but from its refusal to produce transcripts of grand jury testimony in accordance with that order. This distinction is wholly immaterial. The appellant concedes that had

it requested dismissal when the orders for production were entered it could not have secured review. This principle cannot be circumvented by the simple device of proposing an order which requires dismissal upon the happening of a condition subsequent solely in the control of the would-be appellant.

B. The appellant relies on *Thomsen* v. *Cayser*, 243 U. S. 66, a decision which permitted plaintiffs who won on the merits in the trial court and were reversed in the court of appeals to waive the right to a new trial and appeal the judgment of dismissal. That decision is inapplicable. There the plaintiffs had not consented to judgment, judgment on the merits having already been rendered against them. Moreover, the appeal, whoever won, would finally dispose of the case. In *Thomsen* v. *Cayser* the plaintiffs waived the *right* to a new trial; here the appellant seeks to avoid the *burden* of dismissal freely chosen in order to be relieved of production. *Thomsen* v. *Cayser* stands only for the proposition that a party need not perform the useless task of trying a case again on the merits as a condition to putting judgment already rendered against him in final form when he has no further evidence to offer.

C. What the appellant seeks here is the review of interlocutory orders, which orders no longer are in existence because they were superseded by the amended order which the appellant proposed. Review of interlocutory orders by appeal of voluntary judgments of dismissal has been disapproved in numerous decisions, such as *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936). Any pressing matters of public policy raised by the orders for production could have been presented by a motion for a stay pending application for an extraordinary writ. The appellant expressly chose not to pursue that course, and an approach *in terrorem* to this Court on the basis that the invited judgments of dismissal were with prejudice is not justified.

2. The appellant claims standing to appeal solely on the ground of public policy, not on the ground that disclosure would be prejudicial error against it as a litigant in this specific action. The grand jury, however, is an arm of the court, not of the prosecution. Rule 6(e) of the Federal Rules of Criminal Procedure imposes an obligation upon attorneys for the Government to disclose matters occurring before the grand jury only when so directed by the court. It gives them no right to object to a disclosure ordered by the court. When the court granted disclosure, it granted disclosure of court papers. The appellant was not aggrieved as a litigant in this action by the orders for production and accordingly has no standing to appeal those orders.

3. In order to reverse the district court's orders for production of grand jury testimony, if the merits of those orders are reached, it will be necessary to find abuse of the discretion existing both under Rule 6(e) of the Federal Rules of Criminal Procedure and Rule 34 of the Federal Rules of Civil Procedure. Under Rule 6(e) the standard is that the ends of justice require disclosure, and this is equivalent to whatever showing of good cause is required by Rule 34, to the extent that the latter rule is deemed to govern.

A. Under either standard, the liberal rule of pretrial discovery stated in *Hickman* v. *Taylor*, 329 U. S. 495, is necessarily the controlling policy.

B. Undisputed facts concerning the nature of the testimony and appellant's use of it upon which the district court's discretion was exercised include: That the grand jury investigation was coextensive with the present civil action, that the grand jury testimony was used

to prepare this action, that the appellant will continue so to use it and, moreover, that the appellant maintains its right to seek disclosure at the trial of such portions as it deems appropriate or desirable. In addition, facts were presented to the district court indicating strongly that the testimony of some or all of the witnesses was secured solely for discovery purposes for the present civil action.

C. There is no traditional policy of secrecy relating to testimony of witnesses after the grand jury's functions have ended, and disclosure is wholly proper where the ends of justice require it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. None of the reasons underlying grand jury secrecy is applicable in the present situation.

D. Under any standard sufficient cause for disclosure was presented to the district court. No other type of discovery would be a substitute. Depositions would be inadequate, particularly in view of the number of witnesses and the complicated nature of the issues. However, in so far as depositions did elicit the same facts as the grand jury testimony of the witnesses, they would eliminate the secrecy of that testimony. To the extent that *Hickman* v. *Taylor* requires an unusual showing for production of attorneys' work papers and mental impressions, it has no bearing on the present case. The appellant is disarmed to argue public policy. It is in the position of a civil litigant trying to preserve a competitive advantage secured through court process. The district court properly concluded that the ends of justice required that this effort not succeed and that good cause existed for production. Under the particular circumstances of this complex antitrust action the district court did not abuse his discretion in requiring production of the transcripts of grand jury testimony.

ARGUMENT.

POINT I.

The orders of the district court to produce transcripts of grand jury testimony cannot be reviewed through appeal of the invited judgments of dismissal.

The question of whether review may be had by the appellant of the district court's orders for production in view of the way in which the dismissal was procured was treated at length in Colgate's motion to dismiss or affirm. We shall not repeat what was said there. Instead we shall summarize the points made and then discuss the appellant's argument in the light of those points.

The following principles of federal practice are established by the authorities cited in Colgate's motion:

1. A judgment entered by invitation or on consent is always affirmed on appeal without consideration of the merits. One who consents waives his right to object, or as it is sometimes put, he is estopped to convict the court of invited error. Also, he is not aggrieved by an order to which he consents, and therefore he cannot appeal. Thus, voluntary dismissals are not reviewable.

2. One cannot accept the benefits of an agreed judgment and appeal from the burdens.

3. Adverse interlocutory orders may not be made reviewable by taking a voluntary judgment of dismissal and appealing the order in the guise of appealing the judgment.

The appellant does not dispute any of these principles. Its position is that they do not apply to the present dismis-

sal. The three branches of the argument in its brief appear to be as follows:

> A. The appellant did not in fact invite or consent to the dismissal below (Appellant's brief, pp. 20-3).
>
> B. The present appeal comes within the principle of *Thomsen* v. *Cayser*, 243 U. S. 66 (Appellant's brief, pp. 23-8).
>
> C. The cases forbidding review of interlocutory orders through voluntary dismissals or nonsuits do not apply because the appellant here did not invite or consent to the dismissal (Appellant's brief, pp. 28-30).

We shall consider each of these points separately.

A. Appellant's invitation of dismissal in the district court.

If words are given their ordinary meanings, appellant's statement of why its proposed amended order did not constitute an invitation to dismiss the action is incomprehensible. Thus on page 20 appellant's brief states:

> "We submit that the foregoing facts show that in proposing the amendment of the order to specify that non-production would result in dismissal of the complaint, rather than some other consequence (*e. g.*, a contempt proceeding), the Government neither invited, nor consented to, the dismissal which followed such non-production."

On its face this statement is equivalent to saying that black is white, especially when one considers that before proposing the amendment the appellant had already informed the court that it would not produce the transcripts (R. 330), and the motion papers requesting the amendment repeated this position (R. 319-21).

The appellant makes the point that if the original production orders had provided for dismissal in case of non-

compliance, it could have appealed a judgment of dismissal entered as a result of non-compliance, citing *United States* v. *Cotton Valley Operators Committee,* 399 U. S. 940 (see appellant's brief, page 21). This we concede.

Counsel for the appellant, on the other hand, must concede that if upon entry of the orders for production they had simply moved to dismiss the action, they could not have secured review of the dismissal. Indeed, they do concede this by stating at page 11 of their brief, and again at page 19, that it was pointed out to the court that non-compliance with the original orders would place the Government's chief law enforcement officer in the unseemly position of disobeying an outstanding order of the court,

> "while voluntary dismissal would mean sacrificing the broad public interest in obtaining a determination of the violation of the antitrust laws charged in the complaint and appropriate relief (*ibid.*)" (Appellant's brief, p. 19).

In the interest of accuracy, however, we must note that nothing resembling this statement was in fact ever presented to the district court (R. 315-22, 331-6). Of course, a stay pending application for an extraordinary writ would have avoided any such dilemma.

The question, then, is whether what occurred in this case more nearly resembles an involuntary dismissal, concededly reviewable, or a voluntary dismissal, concededly not reviewable.

It appears disingenuous for the appellant to argue that, by proposing a procedure under which it made two bites of the dismissal, it thereby converted an unreviewable voluntary judgment into a reviewable involuntary judgment. Yet the appellant's entire position on the point is that

> "the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith" (Appellant's brief, p. 21).

It is hard to imagine a less material distinction.

In the very papers that proposed the order the whole sequence of events intended by the appellant was laid out. Thus the brief in the district court said:

> "Under these circumstances, we urge the Court to enter an amended order which provides that if the transcripts are not made available by August 24 (the date previously fixed by the Court), an order will be entered dismissing the complaint * * * If such an amended order is entered, the United States intends to appeal from the subsequent judgment of dismissal * * *" (R. 321).

The rule against review of voluntary dismissals surely cannot be circumvented by the simple device of proposing an order which requires dismissal on the happening of a condition subsequent solely in the control of the would-be appellant.

B. Inapplicability of *Thomsen* v. *Cayser*, 243 U. S. 66.

To avoid the many cases cited in the appellees' motions to dismiss or affirm which hold consent judgments and voluntary dismissals not appealable, the appellant relies upon the case of *Thomsen* v. *Cayser*. This decision and the two subsequent cases in this Court which follow it (see appellant's brief, page 25, footnote) deal with a specific situation not related to the present one.

As the appellant's brief states, page 23, that was a case in which the plaintiffs had secured judgment below in a private antitrust suit, the trial court having found for the plaintiffs as a matter of law. The trial had been conducted

on the theory that the reasonableness of the defendants' restraint was immaterial. Subsequently this Court decided *Standard Oil Co.* v. *United States,* 221 U. S. 1 and *United States* v. *American Tobacco Co.,* 221 U. S. 106. The Court of Appeals concluded that it could not hold the restraint unreasonable as a matter of law. However, the court thought it would be unduly prejudicial to dismiss and so granted a new trial, *Union Castle Mail S. S. Co.* v. *Thomsen,* 190 Fed. 536 (2d Cir. 1911). The plaintiffs then petitioned for rehearing and asked for dismissal rather than a new trial. In granting the petition the Court of Appeals stated:

> "PER CURIAM. We understand from the petition of the plaintiffs below that they do not desire to present additional testimony and do not wish a new trial of this action. We understand, also, that they are willing to stand on the record as made, and that they prefer instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint in order that they may carry the case to the Supreme Court without further delay" (190 Fed. 1022).

This Court in denying a motion to dismiss the appeal said:

> "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay" (243 U. S. 83).

The important point is that the plaintiffs, unlike the appellant here, did not consent to a *judgment* against them. Judgment on the merits had already been rendered against them. They, presumably because they had no additional evidence on the merits to offer, waived their right to a new trial and stood on the record below in order to get appellate

review of the point of law on which their judgment on the merits had been reversed. That appellate review would necessarily dispose of the case. If the Court of Appeals was affirmed, of course, the plaintiffs would be concluded. Equally, however, if the Court of Appeals was reversed, then the defendants would be concluded. Either way the case was over. The sole purpose of the plaintiffs' waiver was to put the judgment previously rendered against them on the merits in final form so that it would be appealable. This they did by waiving the right to a new trial offered by the Court of Appeals.

The posture of the appellant here is wholly different. The only judgments entered against it were upon its own invitation. The orders for production were not judgments and bore no relation to the merits of the action. The appellant here did not waive a right to attempt to have an adverse judgment set aside by the lower court rather than the appellate court. Its position is simply this: it was dissatisfied by an interlocutory order and therefore invited entry of judgment of dismissal.

The argument is made that in both *Thomsen* v. *Cayser* and here the change was in the form of the order rather than in its substance. Such distinctions are generally meaningless as a basis for decision. Also, as this Court recently said in *Carroll* v. *United States,* 354 U. S. 394, 406:

> "Moreover, in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction."

In any event, it is difficult to view a change from an order to produce documents to an order providing for final judgment if they are not produced as a mere change in form.

Equally difficult to follow is the argument that this was not a voluntary dismissal because "the Government pro-

posed a change in the form of the order not [as in *Thomsen* v. *Cayser*] to expedite an appellate ruling, but to further the public interest by avoiding the 'unseemly position' of requiring the country's chief law enforcement official to choose among alternative courses of conduct * * *" (see appellant's brief, pages 25-26). This choice is an additional reason that no appeal is permissible. The appellant in order to be relieved of the necessity for production of the transcripts, or of possible contempt citation or other alternatives open to the court, freely chose dismissal. Having accepted the benefit of non-production, the appellant should not now complain of the burden of dismissal, a point discussed in Colgate's motion to dismiss or affirm at pages 17-19. In *Thomsen* v. *Cayser,* the appellants waived a right offered them, the right to a new trial. Here the appellant seeks to avoid a burden voluntarily accepted.

Thomsen v. *Cayser* stands only for the sensible proposition that a party should not be put to the useless task of going through a second trial on the merits as a condition for putting judgment already rendered against him in final form when he has no further evidence to offer. The appellant here is not in that situation.

C. Appeal of interlocutory orders.

Colgate's motion to dismiss or affirm, pages 19-21, lists cases from this Court and the courts of appeals of seven circuits which hold voluntary dismissals or nonsuits not reviewable. If a plaintiff dissatisfied with an interlocutory order could dismiss the action and then appeal the order in the guise of appealing the dismissal, the rule against appeal of interlocutory orders would become meaningless.

To this argument, the appellant's only answer is that the dismissal in the present case was not invited or consented to. Thus, it is said, the production order can be reviewed

> "under the general principle that where, as a result of non-compliance with an interlocutory order, a court enters a final judgment of dismissal, review of the latter necessarily embraces review of the earlier order upon which it depends. * * * The principle is equally applicable here" (Appellant's brief, pp. 28-9).

The fallacy in this position is well illustrated by the fact that the "earlier orders" sought to be reviewed do not exist any more. They were superseded on appellant's motion. The action was not dismissed as a result of non-compliance with those orders. The court never had the chance to decide the result of non-compliance. The action was dismissed pursuant to appellant's amended order, with which there was complete compliance—i.e., the transcripts were not produced and the complaint was dismissed just as the order provided and as the appellant intended at the time the amended order was submitted to the court. Thus the appellant is here in the position of asking review of non-existent orders as part of review of invited judgments of dismissal.

Perhaps the most cited case on the non-reviewable nature of voluntary dismissals is *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936). There Judge Parker said for the court:

> "But, although a voluntary nonsuit is a final termination of the action, it has been entered at the request of the plaintiff, and he may not, after causing the order to be entered, complain of it on appeal. For this reason, it is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit * * *
>
> "It does not help plaintiff to say that his complaint is of the order refusing remand of the cause

> and not of the judgment of nonsuit, which is relied upon merely as a final order from which appeal may be taken. Even in those rare jurisdictions • • • which permit appeal from an order of voluntary nonsuit where there is a ruling of the court which strikes at the heart of the case and precludes recovery by plaintiff, appeal from such order does not lie to review rulings which do not have the effect of determining the case against plaintiff.
>
> • • • • • •
>
> "The crux of the matter is that an order refusing to remand is not a final or appealable order, and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing" (86 F. 2d 297).

That is precisely the situation here. The order for production of the transcripts of grand jury testimony was not an order which had "the effect of determining the case against plaintiff," and it was thus not appealable under any system of practice. If the appellant thought the order was fraught with all the detrimental effects upon public policy relating to grand jury proceedings now claimed, that position could have been presented fully upon an application for an extraordinary writ, with a stay of the orders pending the application. No effort was made, however, to pursue this course. Dismissal was chosen instead.

It is interesting to note that the appellant now volunteers that this dismissal was with prejudice (see appellant's brief, page 29, footnote). Whether with or without prejudice, the invited dismissal as a consent judgment is equally not appealable. Also in either case, a reversal would not, unlike *Thomsen* v. *Cayser*, dispose of the action; and hence allowing this appeal would be allowing an interlocutory appeal.

Acknowledging that the dismissal is with prejudice, gether with reciting the previously quoted statement roneously said to have been made to the district court out "sacrificing the broad public interest in obtaining determination of the violation of the antitrust laws arged in the complaint and appropriate relief", suggests at the appellant proposes an argument *in terrorem* to is Court. The argument would be that an affirmance on is procedural point will prevent dealing on the merits th alleged monopolization and restraint of trade in the ap and synthetic detergent industry.

Here again, the obvious way for the appellant to pre-rve whatever rights it had would have been to request a ay pending an application for an extraordinary writ. It d not choose this course. As previously noted, it expressly jected this course; and in entering the judgments of dis-ssal the court was merely doing what the appellant asked. us the appellant now seeks to force this Court to pass on an interlocutory ruling and to do so in the posture ere an adverse decision would dispose of the case on e merits. We submit that these tactics do not warrant couragement.

Brushing aside all the non-essentials, we have here the mple proposition of a plaintiff who seeks review of an verse interlocutory order by means of voluntarily request-g a judgment of dismissal. Both precedent and common nse require that he not succeed.

Accordingly, the judgments should be affirmed without rther consideration of the merits.

POINT II.

The appellant has no standing to appeal the orders for disclosure of grand jury testimony.

The appellant seeks to appeal here only the general question of public policy. It does not claim that disclosure of the grand jury testimony would be prejudicial error against it in this specific action against these defendants. It defends its right to use the testimony (see appellants' brief, pp. 50-53), but it does not say that as a litigant *in this case* it has a right to exclusive use. It does not and cannot claim a role with respect to the particular grand jury involved, now long discharged. It appeals only the pure and abstract question of the considerations underlying secrecy of grand jury proceedings.

The Attorney General, however, is not the public official charged by law with protection of public policy relating to grand jury secrecy. The grand jury is traditionally regarded as an appendage of the court, *Ex parte Savin,* 131 U. S. 267, 277, or an arm of the court, *Carlson* v. *United States,* 209 F. 2d 209, 213 (1st Cir. 1954). In *Cobbledick* v. *United States,* 309 U. S. 323, 327 this Court said:

> "The proceeding before a grand jury constitutes 'a judicial inquiry', *Hale* v. *Henkel,* 201 U. S. 43, 66, of the most ancient lineage."

See also *Wilson* v. *United States,* 77 F. 2d 236 (8th Cir. 1935), *cert. denied,* 295 U. S. 759 and the cases discussed in that opinion. In no sense is the grand jury an arm of the prosecution. See *Durbin* v. *United States,* 221 F. 2d 520 (D. C. Cir. 1954).

Rule 6(e) of the Federal Rules of Criminal Procedure provides:

> "(e) *Secrecy of proceedings and disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. * * * No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The Advisory Committee Note to this subdivision reads in part:

> "1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure * * * Government attorneys are entitled to disclosure of grand jury proceedings, other than deliberations and the votes of jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice."

Thus under Rule 6(e) and the common law rule which it embodies the sole right of attorneys for the Government in respect of grand jury testimony is disclosure for use in the performance of their duties. They in turn have an *obligation* to disclose matters occurring before the grand jury only when so directed by the court. They have no *right* under the rule to prevent or object to disclosure.

In the district court, and even here in its jurisdictional statement, page 8, the appellant has sought to invoke a privilege against disclosure of the transcripts of grand jury testimony as "executive papers" subject to a formal claim of privilege by the Attorney General. The appellant has now receded from this position (see appellant's brief, page 31, footnote).

This recession is proper, but it does not go far enough. Under the applicable rule, the appellant is not charged with the responsibility of protecting the secrecy of grand jury proceedings except in a purely negative sense. Government attorneys may not disclose grand jury testimony except pursuant to direction of the court. Nothing in logic or in precedent, however, gives them any standing to instruct the court as to the standard by which the court shall order disclosure. It is, rather, for the court to instruct them.

It may well be that if the Attorney General became conscious of what he considered abuse of discretion on the part of a court in disclosure of grand jury proceedings he could or should inform the court of his views. It may be that if the court rejected those views he could or should seek review through an extraordinary writ. This course was not chosen.

The fact that the Attorney General has physical possession of these papers can make no difference as to his standing to appeal. Such possession must necessarily arise under Rule 6(e) and be subject to control of the court. See *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 21 F. R. D. 233 (D. D. C. 1957). It would unquestionably be proper for the court to have possession of a copy of the transcripts. If that were so and pursuant to motion by the defendants the court disclosed them, surely no one would seriously suggest that the Attorney General could invite a dismissal and then appeal on grounds of public policy. Thus the appellant is erecting its entire standing to appeal upon the happenstance that the Attorney General had a copy of the transcripts and the court did not.

The appellant may not in its role as a litigant secure an appeal as of right of an order to which its objection is solely in its role as preserver of grand jury secrecy. As a

litigant it was not aggrieved by the orders for production, and not being aggrieved, it may not appeal them, *Parr* v. *United States*, 351 U. S. 513.

The fact that the appellant as a litigant in this specific action, with an obvious competitive advantage secured through use of the grand jury testimony, seeks in the name of public policy to appeal the orders which would remove that advantage presents an anomaly. This anomaly shows the wisdom of the procedure which leaves the policy as to grand jury secrecy solely in the discretion of the district court.

Accordingly the judgments should be affirmed.

POINT III.

The orders to produce the transcripts of grand jury testimony were a proper exercise of discretion by the district court.

In order to reverse the district court's orders for production of the transcripts of grand jury testimony, assuming the merits of those orders can be reached, it is necessary to find a double abuse of discretion.

The court's orders are supported by two separate grants of discretionary power. That given by Rule 6(e) of the Federal Rules of Criminal Procedure to direct an attorney for the Government to disclose matters occurring before the grand jury has already beeen discussed. The court also has pursuant to Rule 34 of the Federal Rules of Civil Procedure discretion to order production of documents in the possession of parties. *Hickman* v. *Taylor*, 329 U. S. 495, 512.

Other district courts have relied solely upon Rule 6(e) or the common law rule in ordering disclosure of grand jury

testimony in connection with various types of non-criminal proceedings: *Doe* v. *Rosenberry*, 152 F. Supp. 403 (S. D. N. Y. 1957), a disciplinary proceeding against a member of the bar; *In re Bullock*, 103 F. Supp. 639 (D. D. C. 1952), an investigation of dereliction of duty by a police inspector; *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E. D. Pa. 1933), a proceeding to revoke a beer permit.

The court here, however, treated the motions as being brought under Rule 34; and in his opinion he equated a showing that the ends of justice require disclosure with a showing of good cause (R. 208). We submit that this analysis is correct if Rule 34 is deemed the basis of the orders, and that technical arguments of the sort the appellant makes as to what constitutes "good cause" for production of other types of documents in other types of cases carry no weight.

In any event, in order to reverse this Court must decide both that the ends of justice did not require production and that good cause for production was not shown and, further, that the district court committed an abuse of discretion under both standards in reaching the opposite conclusion.

At the outset of the following discussion, we should like to emphasize that the district court's decision was based upon his thorough knowledge of the facts of this particular case and his decision relates only to this particular case. The appellant tries to argue as though this decision throws open the testimony of all witnesses before all grand juries. It does not, of course, and was not intended to do so. The court's decision was based upon the problems of the "big case" and of this particular big case (R. 209, 262). As the court said during the argument of appellant's motion for reconsideration:

> "It was not my intention, of course, to tear the curtain right off the grand jury for any purpose. I

thought that my opinion was very careful, and I was only judging the facts in this case, and this type of litigation. That is all" (R. 303).

A. The liberal discovery policy in civil actions.

Whether the court's discretion was exercised under Rule 6(e) or Rule 34 or both, the policy behind the exercise necessarily is the liberal rule of pretrial discovery in civil actions, which this Court summarized in *Hickman* v. *Taylor*, 329 U. S. 495, 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. • • •

> "8 'One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

B. The nature of the grand jury testimony and appellant's use of it.

The following facts as to the nature of the testimony and appellant's use of it, which were stated in Colgate's briefs to the district court, have never been disputed:

1. The grand jury investigation was co-extensive with the complaint in the present civil action (R. 473).

2. At least 28 witnesses testified, these consisting of current and former officers and employees of the

defendants in the civil action, and representatives of grocery chain stores, oil and chemical companies, a meat packer, a tallow broker, a fats and oils trade journal, a market survey organization and a supplier-competitor (R. 471-2).

3. The appellant has used the grand jury testimony in preparing the present civil action (R. 485).

4. The appellant will continue to use the testimony in preparing and trying this action (R. 486, 542-3).

5. The appellant maintains its right to seek disclosure at the trial of such portions of the grand jury testimony as it deems appropriate or desirable (R. 541-2).

In addition, Colgate presented facts, and statements of representatives of the Attorney General, which strongly support the conclusion that the grand jury investigation, at least so far as it related to testimony of witnesses, was conducted for the sole purpose of pre-complaint discovery for the present civil action (R. 479-85).

This material includes, among other items, testimony by the then Assistant Attorney General in charge of the Antitrust Division before a committee of the House of Representatives that "the sole means for compelling pre-complaint data in civil cases is the grand jury", which testimony was quoted in a footnote to the district court's opinion (R. 210-1). Also quoted in Colgate's brief was a statement of the Chief of the Special Litigation Section of the Antitrust Division that "the first point where we can make a final decision, based upon the facts, as to the appropriate proceeding [civil or criminal, or both], is after a file search of the subject companies" (R. 482-3).

Most of the defendants' files were produced for the grand jury during the year 1951 (R. 483). So far as we

know, most of the witnesses were called subsequent to June 16, 1952. By the time these witnesses were called the investigation had been going on for a year and the attorneys for the appellant had had the documents necessary for a decision as to whether to proceed civilly or criminally for at least five months. It is reasonable to suppose that by this time they had already decided to proceed civilly and took testimony of witnesses solely for civil discovery.

Some of the witnesses certainly were called solely for discovery purposes in the civil action. As previously noted, Colgate's president Mr. E. H. Little (now chairman of the board) testified just one week before the grand jury's term expired and it was discharged. We doubt that appellant will now say that it was only subsequent to his testimony that the decision was made not to proceed criminally.

Significant in this connection is the following statement in the Report of the Attorney General's National Committee to Study the Antitrust Laws, dated March 31, 1955 which quotes the then Assistant Attorney General in charge of the Antitrust Division as follows:

> "He has also informed us that before a criminal action is brought the following procedures are currently invoked:
>
> "In the first instance a recommendation is made by the attorney in charge of the particular investigation. If he is in the field, his recommendation is then reviewed by his field office chief. It is then reviewed by the appropriate litigation section chief in Washington. The section chief's decision is reviewed by the first or second assistant to the Assistant Attorney General and by the Assistant Attorney General. Review at the various levels is effected not only by oral conferences, but also by written memoranda of facts detailing the evidence against each proposed defendant" (p. 350).

It is obvious that this sort of thing takes time, and the decision to proceed civilly was not made one week before the grand jury's term expired, nor made on the basis of the testimony of witnesses who testified one week before the grand jury's term expired.

Another bit of evidence is the complaint itself, which is a long and complex document. It was filed two weeks and two days after the grand jury was discharged, with Thanksgiving intervening. It is not likely to have been drafted and approved in that period; it was doubtless in process long before.

All these matters were presented to the district court. He did not make any finding as to whether any or all witnesses before the grand jury were called purely for civil discovery. No such finding was necessary to support his decision. We submit, however, that in determining whether he abused his discretion in concluding that the ends of justice required disclosure, it is a legitimate consideration that all these factors indicate that some or all of the witnesses were called by the appellant solely for civil discovery.

C. Inapplicability of any policy of secrecy.

Unless the secrecy which attaches to some aspects of grand jury proceedings forbids it, requiring disclosure of this testimony could not be regarded as an abuse of discretion. The district court was certainly entitled to conclude that the liberal attitude toward discovery in civil proceedings does not contemplate the taking by one party of *ex parte* depositions under process of the court without disclosure of their contents to opposing parties.

The appellant in discussing the grand jury wraps it in a cloak of tradition and mystery that is well-nigh medieval. The fact is that there is no tradition against disclosure of the testimony of witnesses once the grand jury has been

discharged. This principle was recognized by this Court in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4:

> "Grand jury testimony is ordinarily confidential. See Wigmore, supra, §2362. But after the grand jury's functions are ended, disclosure is wholly proper when the ends of justice require it."

Lower court cases announcing the same principle include *United States* v. *Alper*, 156 F. 2d 222 (2d Cir. 1946); *United States* v. *Byoir*, 147 F. 2d 336 (5th Cir. 1945); and *Atwell* v. *United States*, 162 Fed. 97 (4th Cir. 1908).

Even in *Goodman* v. *United States*, 108 F. 2d 516 (9th Cir. 1939), the decision upon which the appellant relies most strongly in pressing its argument for secrecy, the court said:

> "It is proper to add that the court may at any time in the furtherance of justice remove the seal of privacy from grand jury proceedings" (108 F. 2d 521).

The holding of this case was that a witness before the grand jury could properly be sworn to secrecy. This decision has now been overruled by Rule 6(e). The Advisory Committee Note to that rule states:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

Decisions which have granted disclosure in connection with various types of proceedings other than criminal are *Doe* v. *Rosenberry*, *In re Bullock* and *In re Grand Jury*

Proceedings, all cited *supra* at page 25, and *United States* v. *Ben Grunstein & Sons Co.,* 137 F. Supp. 197 (D. N. J. 1955).

It should be noted that such criminal cases as *Costello* v. *United States,* 350 U. S. 359, *United States* v. *Johnson,* 319 U. S. 503, and *United States* v. *Garsson,* 291 Fed. 646 (S. D. N. Y. 1923), are entirely without application (see appellant's brief, page 38). They do not relate to discovery of testimony but to efforts to overturn the indictments on the ground that they were improperly returned. The problem is not one of secrecy but of orderly administration of justice. Certainly the courts should not be placed in the position of conducting a "preliminary trial to determine the competency and adequacy of the evidence before the grand jury", *Costello* v. *United States,* 350 U. S. 359, 363. This has nothing to do with secrecy, and the point would be valid whether grand jury proceedings were secret or not.

Grand jury secrecy is not, any more than any other concept of law or procedure, a shibboleth to be preserved without analysis. The reasons for secrecy have been stated in *United States* v. *Rose,* 215 F. 2d 617, 628-9 (3d Cir. 1954), and this formulation has been adopted by the appellant (see appellant's brief, pages 39-40):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused

> who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

The obvious basis for all these reasons is to prevent interference with the grand jury itself in the conduct of its deliberations, and to prevent those whose indictment is considered from escaping on the one hand or being unfairly injured on the other. After the grand jury is discharged, in the circumstances of the present case, none of these reasons can apply.

The appellant presses only one, the fourth reason (see appellant's brief, pages 40-42). The argument is that preventing disclosure of testimony after the grand jury is discharged is necessary to protect the grand jury *as an institution.* That is not, however, the reason for secrecy as to testimony of witnesses. The reason is to protect the particular grand jury before whom the witnesses appear. Disclosure of the testimony here in question could not now interfere with the grand jury discharged in Newark on November 25, 1952. In any event, an assurance of permanent secrecy to witnesses before the Newark grand jury would not protect future grand juries. To the extent such an assurance would affect them at all, it would rather tend to encourage presentation of perjured testimony to them.

This is the point made in 8 Wigmore, *Evidence* §2362 (3d ed. 1940), the section to which this Court referred in the quotation given above from the *Socony-Vacuum* decision:

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The

secrecy is the State's inducement for obtaining testimony. * * *

* * * * * *

"But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:

* * * * * *

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:

* * * * * *

"There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended,* the privilege of the witnesses not to have their testimony disclosed should be deemed to continue.

"This is, in effect, the law as generally accepted today. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required *'whenever it becomes necessary in the course of justice.'* Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle."

The appellant's discussion at pages 41-42 of its brief as to why secrecy of witnesses' testimony should survive the grand jury is curiously abstract. There is talk of the privilege as to identity of informers—but no claim that informers were used here, and indeed the appellant has offered to furnish a list of the witnesses (R. 294). There is discussion of possible pressure on witnesses in antitrust

cases. There is a statement that 24 of the 28 witnesses subpoenaed "might have been especially reluctant to speak freely about appellees before the grand jury had they anticipated that such testimony was likely to be made public."

At the same time, the appellant maintains its right itself to seek disclosure at the trial if it should deem such disclosure "appropriate or desirable" (R. 198). Also it now suggests, doubtless in deference to the philosophy underlying the decision in *Jencks* v. *United States*, 353 U. S. 657, that maybe even the appellees could properly get disclosure at the trial for use in cross-examination (see appellant's brief, pages 43, footnote, and 52-53). But if disclosure at the trial at appellant's option or for use in cross-examination is proper, the hypothetical assurance of witnesses that their testimony will not be made public becomes fairly illusory.

The simple fact which the appellant cannot obscure is that any traditional policy of secrecy is not applicable to the present situation. Disclosure of the particular testimony in this particular proceeding will not "subvert the functions of federal grand juries". It will only subvert appellant's competitive advantage in this civil action. If the district court abused his discretion, it was not on the basis of any policy of secrecy inherent in grand jury proceedings.

D. The justice of disclosure.

In opposing disclosure the appellant's whole argument is that because grand jury proceedings are secret some transcendent showing of necessity or "good cause" is required, relying on *Hickman* v. *Taylor*. Disclosure is not needed, however, says the appellant, because the evidence contained in the grand jury testimony could be secured through depositions of the grand jury witnesses.

This line of argument is based on two mutually inconsistent premises, and we suggest that the appellant should choose between them. These premises are:

1. In the grand jury transcripts is the real, frank, secret testimony of the witnesses. "Since their economic well-being thus was so closely dependent upon maintaining favorable relations with appellees, those witnesses might have been especially reluctant to speak freely about appellees before the grand jury had they anticipated that such testimony was likely to be made public" (Appellant's brief, p. 42).

2. The grand jury testimony contains nothing that could not be readily secured by taking the depositions of the witnesses, whose names the appellant has offered to furnish. "There was no showing that those witnesses were unavailable, or that appellees could not interview them or take their depositions, or that they had not done so. * * *

* * * * * *

"In sum, the situation here is comparable to *Hickman* v. *Taylor, supra,* p. 509, where, '[f]or aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories [extensive pretrial disclosures by the Government] or is readily available to him direct from the witnesses for the asking'" (Appellant's brief, pp. 46-8).

As to these two propositions, we submit:

1. Either the witnesses testified before the grand jury to facts which they would not now disclose, in which event the appellees could not obtain the relevant facts through depositions;

2. Or the witnesses said nothing before the grand jury that they would not say otherwise (barring the lapse of time and the inability of the appellees to frame

the same questions), in which event secrecy is meaningless and taking depositions would be a useless and insufficient effort at duplication.

The concrete situation is that there is nothing secret about this testimony, but it would be impossible for the appellees to duplicate it. This competitive advantage of a body of *ex parte* testimony by witnesses isolated in the grand jury room, without counsel, is what the appellant clings to.

Even if the appellees could duplicate it, the obvious question is why they should be required to do so. The task is either impossible or, if possible, pointless. Creation of a second set of transcripts on roughly the same subject matter would serve no purpose, and to the extent that it failed to duplicate the set the appellant now has, it would preserve not secrecy of the grand jury but the competitive advantage of the Department of Justice secured through process of the court. As the appellant stated at an earlier point in the case, when it was the party seeking documents:

> "The showing of good cause required by Rule 34 varies according to the facts of the particular case and considerations of practical convenience. There are no universally applicable horn-book rules. *Moore's Federal Practice*, on which the defendant relies, states (4 *Moore's Federal Practice* (2 Ed. 1950), pp. 2449-2450):
>
> > 'The party seeking inspection is required to show "good cause therefor." Considerations of practical convenience should play the *leading role* in determining what constitutes good cause' " (R. 392).

It is of interest that the current position of the appellant is based upon *Hickman* v. *Taylor*, a decision which espouses the principle of mutual discovery in civil actions but states an exception for the work product of attorneys.

Although coming close to it, the appellant does not quite dare to claim grand jury proceedings as the work product of the Department of Justice (see appellant's brief, page 38, footnote). Instead the argument runs that because of the traditional secrecy of grand jury testimony, defendants in a civil suit brought by the Attorney General must show some sort of extraordinary basis for access to these court records equivalent to or greater than what litigants in private cases must show for access to the litigation files of opposing attorneys. This is, on its face, a complete *non sequitur*. The appellees do not seek any files of the appellant; they seek only court files to which the appellant has had access, and court files as to which no reason for secrecy exists.

The facts of *Hickman* v. *Taylor* are sufficient to show the inapplicability to the present case of the phrases from that opinion sprinkled throughout appellant's brief. It was a case whose subject matter was not the history and structure of a major industry for a quarter of a century, but the sinking of a tugboat. The survivors of the sinking had testified before the United States Steamboat Inspectors at a public hearing, and this testimony was recorded and made available to all interested parties. Fortenbaugh as attorney for the owners and underwriters also interviewed witnesses. The representative of a drowned crew member brought suit and sought information by means of 39 interrogatories. The respondents answered 38 of them, but refused to answer one which demanded as of right statements of witnesses in the form of "exact copies * * * if in writing, and if oral, * * * the exact provisions of any such oral statements or reports" (329 U. S. 498-9). In refusing to sustain an adjudgment of contempt for failure to produce, this Court differentiated the written from the oral statements.

It was in respect of the oral statements that the opinion referred to the "rare situation justifying production", to which language the appellant repeatedly adverts (see appellant's brief, pages 17, 36 and 52). This was because such material could not qualify as evidence; and to use it for impeachment would make the attorney a witness, as well as invade the privacy of his professional activities (329 U. S. 513). As to the written statements, the opinion said only that "there was no room for [the trial judge's] discretion to operate in favor of the petitioner" where no attempt was made to establish any reason for production and there was "only a naked, general demand for these materials as of right" (329 U. S. 512).

Obviously this discussion, based on the effort of the attorney of one private litigant to investigate the mental impressions and take advantage of the diligence of the other party's attorney without even attempting to justify doing so, has no application here. The use by the appellant of court process to compel testimony, the sprawling nature of the issues, the enormously flexible position of the appellant here as to which issues it will press, and the absence of any element of unfair overreaching in the attempted discovery are sufficient grounds for distinction. Nor can the elaborate briefs and arguments presented by the appellees be called "only a naked, general demand."

The decisions in *Alltmont* v. *United States*, 177 F. 2d 971 (3d Cir. 1950) *cert. denied*, 339 U. S. 967 and *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (D. C. Cir. 1948) on which the appellant relies deal only with whether more than a *pro forma* showing of "good cause" is required to compel production of written statements of witnesses to accidents. Here again, what was presented to the district court in the present case was much more than a *pro forma* showing.

What constitutes an adequate showing of good cause has been the subject of some disagreement in the district courts. Thus in *Connecticut Mutual Life Insurance Co.* v. *Shields*, 17 F. R. D. 273, 277 (S. D. N. Y. 1955), the decisions are summarized as follows:

> "In line with this trend towards the elimination for formalism, the greater number of courts considering the question of good cause have decided that good cause is established when it appears that the papers sought are relevant to the subject matter of the action. * * * On the other hand, there are cases holding to the restricted view that good cause consists of something more than a showing of relevancy, as, for example, necessity, but these cases do not seem to express the modern view."

As previously noted, disclosure of these documents under Rule 6(e) does not require any formal showing of good cause. If, however, the Rule 34 standard is applied in its strictest form, the following considerations presented to the district court were ample to support the exercise of his discretion:

1. The complaint was perhaps unique in covering in such complete fashion every aspect of the defendants' businesses: selling prices, methods of selling, advertising methods, methods of promotion, packaging, production processes, patent licensing, patent acquisitions, market survey methods, use of multiple brands, by-products, purchase prices, purchasing methods, mergers, trade association activities, etc. (R. 10-3).

2. The witnesses were numerous and scattered around the country (R. 169, 433, 436-8, 471-2).

3. The subject matter of their testimony was necessarily complex but unknown to the defendants, so that

in order to develop the facts contained in their testimony it would be necessary to question each about the broad issues of the complaint. Such a duplicative and confusing procedure would make the big case even bigger (R. 478-9).

4. This process in addition to being expensive, time-consuming and harrassing to the witnesses would be inadequate. The lapse of time would have changed recollections. Counsel for the defendants could not duplicate what had been obtained years before from the witnesses questioned without counsel in the grand jury room (R. 479).

5. Such a procedure would never compensate for the plaintiff's strategic advantage in having an extra set of testimony (R. 479).

6. The plaintiff has used and will continue to use the grand jury testimony (R. 485-6).

7. The grand jury testimony was obtained by the plaintiff in part or in whole for the sole purpose of civil discovery (R. 479-85).

8. The grand jury testimony was unquestionably relevant to the issues of the complaint (R. 473-4).

In connection with the foregoing the appellant appears to suggest in its brief that the documentary disclosures made by it somehow are a substitute for the grand jury testimony (see appellant's brief pages 7-8 and 46). By their nature the two things could not be equivalent. Also, as previously noted, this documentary procedure did not require the appellant "to disclose any detailed evidential facts" (R. 236). Suffice it to say that the appellant never made this argument to the district court, who was fully familiar with what was involved.

We submit that in the light of all these considerations the district court cannot be said to have abused his discre-

tion when, on the basis of long experience with this specific case, in granting the motions he concluded:

> "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy" (R. 217).

The zeal with which it here has tried to protect its competitive advantage in exclusive possession and use of this *ex parte* testimony, and the exclusive right to suggest to the court when disclosure is or is not "appropriate or desirable" (R. 198), shows that the appellant is disarmed to argue the question of public policy. As was said in *Hoffman* v. *United States*, 341 U. S. 479, 485, quoting from *Hale* v. *Henkel*, 201 U. S. 43, 59:

> "'• • • the most valuable function of the grand jury • • • [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused' • • •".

We suggest that if there has been in the procedure in the present case any tendency to "subvert the functions of federal grand juries" (see appellant's brief, page 43), it arises not from the court's orders but from appellant's efforts to convert the grand jury from a shield between the prosecutor and the accused to a sword against these civil antitrust defendants. The ends of justice require that this effort not succeed. Under the particular circumstances of this case, the orders of the district court did not constitute an abuse of discretion.

Conclusion.

Because the judgments of dismissal appealed from were entered upon the invitation and with the consent of the appellant, they should be affirmed without consideration of the merits.

Because the appellant has no standing to appeal the orders for disclosure of the grand jury transcripts, which are court papers, the judgments should be affirmed.

Should the merits of the orders for production of the transcripts of grand jury testimony be reached, the judgments should be affirmed on the ground that those orders did not constitute an abuse of discretion by the district court.

Respectfully submitted,

MATHIAS F. CORREA,
Cahill, Gordon, Reindel & Ohl,
63 Wall Street,
New York 5, New York,
Attorney for Appellant
Colgate-Palmolive Company.

Of Counsel:

JERROLD G. VAN CISE,
JAMES B. HENRY, JR.,
New York, New York.

April 14, 1958.